

# After the 8<sup>th</sup>: Ireland, Abortion, and International Law

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## A. Introduction

In 1983, Ireland became the first state in the world to enshrine fetal rights in the Constitution.<sup>1</sup> Art 40.3.3 (the 8<sup>th</sup> amendment) provided that:

“The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.”<sup>2</sup>

On 25<sup>th</sup> May 2018, thirty-five years after its adoption, the Irish electorate voted to remove this provision from the Constitution by referendum. 66.40% voted in favor of repealing the provision and replacing it with a provision giving the Oireachtas (the Irish Parliament) the power to enact legislation on abortion.<sup>3</sup> On 18<sup>th</sup> September 2018, the President signed the thirty-Sixth Amendment of the Constitution Bill 2018 and thereby formally repealed the 8th amendment. The delay between the referendum result and the formal repeal was caused by unsuccessful legal challenges to the referendum result.<sup>4</sup>

The repeal of the 8th amendment signals an historic turning point for Ireland given that it was traditionally a highly conservative Catholic country with one of the most restrictive abortion frameworks in the world. However, despite this referendum result, considerable uncertainty

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<sup>1</sup> Ireland became the first country in the world to enshrine fetal rights in the constitution in 1983, but since then other countries have followed suit such as Hungary, the Dominican Republic, Ecuador, El Salvador, Guatemala, Madagascar, Paraguay, Philippines, Kenya, Somalia and Swaziland. See Fiona de Londras, “Constitutionalizing Fetal Rights: A Salutary Tale from Ireland” (2015) 22(2) *Michigan Journal of International Law* 243, 245.

<sup>2</sup> The main recognized exception to Art 40.3.3 was that abortion could be performed in the cumulative circumstances where the fetus had not reached viability, and where there was a *real and substantial risk* to the life of the pregnant woman in circumstances which could only be avoided by an abortion. See, *Attorney General v. X* [1992] 1 IR 1. If the fetus was viable, the pregnancy would likely be delivered early to try to vindicate the equal right to life of the mother and fetus as guaranteed under this provision. ‘Viability’ refers to the point at which a fetus can survive outside of the womb, which is affected by multiple factors including birthweight and gestational age: Royal College of Obstetricians and Gynecologists, *Perinatal Management of Pregnant Women at the Threshold of Infant Viability – The Obstetric Perspective* (2014) Scientific Impact Paper No. 41.

<sup>3</sup> The new wording reads as follows: “Provision may be made by law for the regulation of termination of pregnancy.”

<sup>4</sup> Fiach Kelly, “President signs Bill repealing Eighth Amendment into law” (*Irish Times*, 18<sup>th</sup> September, 2018) available at <https://www.irishtimes.com/news/politics/president-signs-bill-repealing-eighth-amendment-into-law-1.3633601>

continued after the referendum because repealing the 8<sup>th</sup> amendment did not itself legalise access to abortion in Ireland. Instead, legislation was needed and on 20<sup>th</sup> December 2018, over six months after the referendum, the Health (Regulation of Termination of Pregnancy) Act 2018 (HRTPA) was signed into law by the President, introducing a legislative scheme for the provision of abortion in Ireland. The Act came into force on 1<sup>st</sup> January 2019 and it remains to be seen how these laws will be interpreted and applied by medical practitioners and by courts should disputes arise.

We argue that this recent change puts Irish law into a state of flux which has the potential to give rise to uncertainty around the provision of abortion services in Ireland. This uncertainty makes Ireland's international law obligations in this context of particular importance. As will be demonstrated, even though Ireland's pre-repeal restrictive framework recognized some exceptional circumstances where abortions could be provided, Ireland has a long history of interpreting and applying these exceptions in a highly restrictive fashion, and we argue that this tendency towards restrictive interpretation of laws related to abortion may be difficult to shift and could influence the application and the interpretation of the HRTPA. In short, this article argues that international law has a significant role to play as Ireland broadens its abortion framework, by (1) providing a yardstick with which to assess whether the new abortion laws contained in the HRTPA respect Ireland's international law obligations; (2) ensuring that this HRTPA is interpreted and implemented in a way which facilitates practical and effective access to abortion under the grounds set out; and (3) providing avenues to challenge obstacles to securing legally available abortion services in Ireland should these arise. In making these arguments, we acknowledge that although Ireland is party to a variety of international law treaties which set out obligations in respect of abortion access, these obligations were conspicuously absent from the abortion debate in the lead up to the referendum. We argue that this stemmed from confusion around the extent of Ireland's obligations in this context and the relationship between domestic and international law. International law's lack of salience in the past is highly regrettable, as it could, for example have allowed the Irish courts to interpret the 8<sup>th</sup> amendment in a broader manner.<sup>5</sup> It is therefore important that we do not repeat past mistakes, and that Ireland's international obligations are taken into account in the implementation and operation of this new framework for abortion access in Ireland.

At the time of writing,<sup>6</sup> the HRTPA is in its early days and it remains to be seen how it will be applied in practice over time. However, some issues have been reported in relation to the rollout of the framework,<sup>7</sup> and recent reports suggest women are still travelling from Ireland to the UK to obtain abortions despite the legal availability of abortion under the grounds set out in the HRTPA.<sup>8</sup> To date,

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<sup>5</sup> See Section F.

<sup>6</sup> 2<sup>nd</sup> April, 2019.

<sup>7</sup> Zuzia Whelan, "We had a very short interval": Some practitioners concerned over timing of abortion services' (*The Journal*, 10<sup>th</sup> January 2019) available at <https://www.thejournal.ie/roll-out-abortion-services-ireland-4432751-Jan2019/>

<sup>8</sup> Elish O'Regan, "Irish women still travelling to Britain in droves for abortions" (*Irish Independent*, 15<sup>th</sup> March 2019) available at <https://www.independent.ie/irish-news/health/irish-women-still-travelling-to-britain-in-droves-for-abortions-37915827.html>

there has been limited legal commentary on the HRTPA,<sup>9</sup> and this piece breaks new ground by showing how international law can influence Irish abortion law after repeal of the 8<sup>th</sup> amendment and its role in the interpretation and application of the HRTPA. In particular, it puts forward a novel interpretation of the Irish Constitution which permits international law to be used as a persuasive source to interpret uncertain domestic provisions, both in the abortion context and in any context where international law provides guidance on an uncertain aspect of domestic law. This approach would help ensure that Ireland respects its obligation to comply with treaties to which it is a party.<sup>10</sup> Moreover, the article makes a broader contribution to the abortion law literature by providing an updated picture of states' international abortion rights obligations, taking into account the recent views of the Human Rights Committee which have significantly developed the law. Many of the obligations mapped out in this piece apply equally to the 66 or so other states with highly restrictive regimes, such as Argentina, Poland, and Mali.<sup>11</sup> Finally, and more generally, this article shows the untapped potential of international law to assist in interpreting restrictive legal frameworks more broadly, and how international law can help institutions move away from patterns of restrictive applications of the law.<sup>12</sup>

The article is structured as follows. This section (section A) sets out the article's main claims, contributions, and structure. Section B lays the foundation for the arguments developed later in the article by setting out the socio-political and legal context of the historical development of abortion law in Ireland and the repeal of the 8<sup>th</sup> amendment. It illustrates the historically contested nature of abortion in Ireland, the complexity of factors which led to the eventual repeal of the 8<sup>th</sup> amendment, and the relatively limited salience international law had in this context. Section C then makes the case for why international law should be adhered to on abortion issues in the domestic context, illustrating that Ireland has committed to complying with international treaties to which it is a party, and also building a normative case for why it is useful to take account of international norms on abortion. Section D then sets out what these international human rights obligations are.

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<sup>9</sup> Fiona de Londras, Vicky Conway, Máiréad Enright, Ruth Fletcher, Sheelagh McGuinness, "Amending the Health (Regulation of Termination of Pregnancy) Bill: 5 Missed Opportunities." (29<sup>th</sup> November, 2019) available at <https://lawyers4choice.ie/2018/11/29/amending-the-health-regulation-of-termination-of-pregnancy-act-5-priority-issues-for-the-seanad/> which was published prior to the adoption of the HRTPA, where the authors highlighted key priority issues which they argued needed to be addressed with the Health (Regulation of Termination of Pregnancy) Bill for an accessible framework for abortion access in Ireland. For a commentary on the law prior to repeal of the 8<sup>th</sup> amendment detailing recommendations for a new framework, see: Fiona de Londras and Máiréad Enright, *Repealing the 8<sup>th</sup>: Reforming Irish Abortion Law* (Policy Press, 2018); Máiréad Enright, Ruth Fletcher, Fiona de Londras, and Vicky Conway, "Position Paper on the Updated General Scheme of the Health (Regulation of Termination of Pregnancy) Bill 2018 (August 2018) available at <https://lawyers4choice.ie/2018/08/15/position-paper-on-the-updated-general-scheme-of-the-health-regulation-of-termination-of-pregnancy-bill-2018/>

<sup>10</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 26, entered into force Jan. 27, 1980.

<sup>11</sup> Roughly 25.5 percent of the world's population resides in 66 countries with highly restrictive frameworks (e.g. countries either prohibit abortion entirely or permit it only to save a woman's life.) These countries are mostly located in the Global South, with the exception of several countries in central and eastern Asia. See 'World Abortion Laws', available at <http://worldabortionlaws.com/questions.html>.

<sup>12</sup> There have been suggestions of an alleged restrictive interpretation of the HRTPA 2018 to deny abortion access to a woman whose pregnancy was alleged to have been diagnosed with a fatal fetal abnormality. See: Kitty Holland, "Woman 'refused' abortion will travel to United Kingdom" (*Irish Times*, 18<sup>th</sup> January 2019) available at <https://www.irishtimes.com/news/social-affairs/woman-refused-abortion-will-travel-to-united-kingdom-1.3762063>

Having established the need for compliance with international law in this context, the remainder of the article examines how such international obligations can influence domestic abortion law in three ways: Section E sets out the grounds for abortion access as contained in the HRTPA, it examines the extent to which the HRTPA addresses Ireland's international law obligations, and the shortcomings which remain in the HRTPA's compliance with international law. International law could be used to petition for change, if needed, to address such shortcomings. Section F then examines international law's potential to influence the *interpretation* of the HRTPA on a day-to-day basis. This section illustrates that it is not enough that laws have been drafted and adopted in a way which complies with international law on paper – laws must also be interpreted and implemented by doctors, hospitals, and courts in a manner which complies with international law. Importantly, in this section we draw upon arguments highlighted in section B by arguing that Ireland's historically restrictive approach to abortion is likely to have lasting effects giving rise to institutionally-engrained approaches to abortion services. These institutionally-engrained approaches could lead to restrictive decision-making, particularly where there is discretion on the scope of domestic abortion provisions. In section G we identify ways in which international law can play an *interpretative and monitoring role* to help encourage broader interpretations at a domestic level, and by also providing avenues to challenge restrictive domestic interpretations of the law at an international level. Finally, section H sets out the main conclusions of the article.

## **B. Socio-Political and Legal Context of Abortion in Ireland**

The complex socio-political and legal context of abortion law in Ireland must first be examined because this context provides the foundations upon which the HRTPA will be interpreted. This section is composed of two parts. Section I demonstrates the traditionally highly restrictive approach to abortion in Ireland dating from before the 8<sup>th</sup> amendment was introduced. This point is developed later in section F where we argue that this historical pattern of reluctance to clarify abortion access could continue in the application of the HRTPA by medical practitioners and/or in its interpretation by courts, and in section G we identify ways that international law can prove a useful vehicle for challenging such approaches.

Having identified Ireland's historically restrictive approach to abortion, section II examines the campaign leading to the repeal of the 8<sup>th</sup> amendment. We argue that this vote gave the government a strong mandate to bring about meaningful change of abortion access in Ireland and is also a prime opportunity for scholars to reconsider the role of international law in this context.

### **I. *An historically restrictive approach to abortion law***

Ireland's restrictive approach to abortion law can be traced back to long before the 8th amendment was introduced. Sections 58 and 59 of the Offences Against the Person Act 1861 (OAPA) made it a

criminal offence to procure a miscarriage or to assist someone in doing so, punishable by up to life imprisonment. The potential chilling effects the law had on women's lives was tragically epitomized in the case of Shelia Rodgers. Shelia Rodgers suffered from breast cancer and a year after having a mastectomy, she became pregnant. Once pregnant she had to stop taking anti-cancer medication due to the potential risk the medication posed to the foetus.<sup>13</sup> Her cancer returned and Shelia Rodgers was refused pain relief until late stages of her pregnancy.<sup>14</sup> On multiple occasions, her husband requested early inducement, caesarean section, and termination of pregnancy but all requests were denied as the foetus could have been harmed.<sup>15</sup> On 17<sup>th</sup> March 1983, in agony, Shelia Rodgers gave birth prematurely to a baby girl who died a few hours after birth.<sup>16</sup> Shelia Rodgers died two days later as a result of cancer in multiple parts of her body. Her case arguably demonstrates the prioritization of the foetal right to life over maternal interests in Ireland even before the 8<sup>th</sup> amendment was introduced in 1983. This protection severely impacted upon Shelia Rodgers because it meant requests for a caesarian section or early inducement so she could be treated for cancer were denied, and it meant her requests for pain relief were only acquiesced to in the late stages of pregnancy. Moreover, the fact that she was denied anti-cancer medication during pregnancy likely also impacted her prognosis.<sup>17</sup> Despite Shelia Hodger's widely-publicised case, the 8<sup>th</sup> amendment was adopted just six months later by a significant majority (66.9%) by way of referendum. This underscores the complexity of abortion within the Irish context, dominated at the time by the strict anti-abortion teachings of the Catholic Church.

The constitutionalisation of foetal rights, through the introduction of the 8<sup>th</sup> amendment, was a significant win for those who feared the liberalization of abortion in Ireland. The Constitution has primacy under Irish law and can only be changed by referendum. This made it almost impossible for the legislature or courts to engage in any meaningful broadening of abortion access while the 8<sup>th</sup> amendment was in place. Subsequent case law carved out limited exceptions to the abortion ban by relying on the equal protection of the life of the mother provided in the 8<sup>th</sup> amendment. However, these developments were entirely reactionary in nature, driven in response to high profile cases and individual tragedies. For example, the 1992 *Attorney General v X* case concerned a pregnant 14-year old girl who had been raped and was prevented from travelling abroad for an abortion by a High Court injunction.<sup>18</sup> The Supreme Court reversed the injunction and held that abortion was permissible in Ireland under the 8<sup>th</sup> amendment when there is a real and substantial risk to the

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<sup>13</sup> Emily O'Reilly, *Masterminds of the Right* (Attic Press, 1992)

<sup>14</sup> Her husband, Brendan Rodgers, is reported as saying: "I went to see Sheila one night and she was in absolute agony. She was literally screaming at this stage. I could hear her from the front door of the hospital and she was in a ward on the fourth floor. I saw the sister and she produced a doctor who said nothing that made any sense." See: Padraig Yeates, "Sheila Rodgers - a case in question" (*The Irish Times*, 2 September 1983).

<sup>15</sup> Ibid.

<sup>16</sup> Ibid; Kitty Holland, "Reasons for women not to be cheerful" (*Irish Times*, 29<sup>th</sup> December, 2012) available at <https://www.irishtimes.com/news/reasons-for-women-not-to-be-cheerful-1.5496>

<sup>17</sup> Brendan Rodgers, Shelia's husband, discussed her treatment and the stopping of this when it was confirmed that she was pregnant in: "Generation 8<sup>th</sup>: Brendan Rodgers interview" (21<sup>st</sup> May 2018) available at <https://twitter.com/JOEdotie/status/998539582819000321>

<sup>18</sup> *Attorney General v. X* [1992] 1 IR 1.

woman's life (including a suicide risk).<sup>19</sup> This case spurred on debate which led to the Constitution being subsequently amended twice to ensure that the 8th amendment did not limit freedom to travel to another State for the purposes of obtaining an abortion and did not limit the freedom to obtain or make available in Ireland information about abortion services available abroad.<sup>20</sup>

However, there was still considerable uncertainty around the legal mechanisms for accessing abortion under the X exception. This uncertainty was eventually successfully challenged 18 years after the X decision in *A, B, C v Ireland*, when the European Court of Human Rights (ECtHR) requested Ireland to clarify when an abortion could be carried out in Irish law where the mother's life was in danger.<sup>21</sup> Despite this ECtHR decision, successive Irish governments delayed clarifying abortion laws, arguably because of the likely backlash from anti-abortion groups. Instead, once again, individual tragedy forced action. The issue could no longer be sidestepped when, in October 2012, a pregnant woman died in circumstances that could have been avoided had her request for an abortion been granted. Ms Savita Halappanavar was miscarrying a foetus when she was 17 weeks pregnant. Her repeated requests for a termination were denied despite the fact there was no prospect of the foetus surviving given the early stage of the pregnancy. The refusal of termination was because a foetal heartbeat was still present and there was no perceived immediate risk to Savita's life. She was reportedly told that she could not have an abortion as 'Ireland is a Catholic country'.<sup>22</sup> She later died because of sepsis. Prof Sir Sabaratnam Arulkumaran, who chaired the Health Service Executive inquiry into Ms Halappanavar's death, stated that the 8th amendment contributed to her death.<sup>23</sup> In his view, if she had a termination when she initially requested it, she would not have developed the sepsis which caused her death.<sup>24</sup>

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<sup>19</sup> This article uses the term 'woman' or 'pregnant woman' when it is directly citing legislation such as the HRTPA and PLDPA or court cases where this term is used. Otherwise the term 'pregnant person' is used to include transpeople who may be pregnant. We do not address the addition of terminology in detail in this piece because, insofar as our research has revealed, this issue has not yet been addressed by the respective TMBs. For more on this issue, see Fiona de Londras and Mairéad Enright, *Repealing the 8<sup>th</sup>: Reforming Irish Abortion Law* (Policy Press, 2018); Mairead Enright, Ruth Fletcher, Fiona de Londras, and Vicky Conway, "Position Paper on the Updated General Scheme of the Health (Regulation of Termination of Pregnancy) Bill 2018 (August 2018) at 7 who recommended that the Bill be updated to include the term 'pregnant person' instead of pregnant woman to ensure full trans inclusivity, and to respect non-binary identity. This proposal is not reflected in the final legislation.

<sup>20</sup> These were the 13th and 14th Amendment to the Constitution which inserted the following two sentences, respectively: "This subsection shall not limit freedom to travel between the State and another state. This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."

<sup>21</sup> *A, B and C v Ireland* App No 25579/05 (ECHR, 16 December 2010).

<sup>22</sup> "Midwife confirms she told Savita Halappanavar Ireland a 'Catholic country'" (*RTE News*, 11<sup>th</sup> April. 2013) available at <https://www.rte.ie/news/health/2013/0410/380613-savita-halappanavar-inquest/>

<sup>23</sup> The Health Service Executive (HSE) is the body that is responsible for the provision of public health services in Ireland. For further information, see <https://www.hse.ie/eng/about/>

<sup>24</sup> At an Oireachtas Cross Party Committee hearing on the future of the 8th amendment, he stated: "'It was very clear the things holding the hands of physicians was the legal issue. Anybody, any junior doctor, would have said this is a sepsis condition, we must terminate... She did have sepsis. However, if she had a termination in the first days as requested, she would not have had sepsis. If she had the termination when asked for it, the sepsis would not arise. We would never have heard of her and she would be alive today.'" see Fiachra Ó Cionnaith "Author of Savita Halappanavar report says 8th Amendment contributed to her death" (*Irish Examiner*, 18<sup>th</sup> October 2017) available at <https://www.irishexaminer.com/breakingnews/ireland/author-of-savita-halappanavar-report-says-8th-amendment-contributed-to-her-death-810432.html>

Ms Halappanavar's death led to national and international outcry.<sup>25</sup> Vigils and protests were held in Ireland and elsewhere.<sup>26</sup> Many criticised the Government's failure to clarify when abortion was permitted under Irish law, as requested by the ECtHR.<sup>27</sup> The Protection of Life During Pregnancy Act 2013 (PLDPA) was subsequently passed in July 2013 and entered into force in January 2014. This Act attempted to clarify the grounds upon which an abortion could be obtained in Irish law, as per the *X* case (i.e. where there is a real and substantial risk to the life of the pregnant woman).

These cases demonstrate that abortion in Ireland has been a matter of extreme contestation. In particular, they demonstrate that meaningful broadening of abortion access was impossible under the 8<sup>th</sup> amendment, and that restrictive interpretation of abortion rights predates the 8<sup>th</sup> amendment.<sup>28</sup> Moreover, it was an uphill struggle to obtain any clarity regarding exceptions to the prohibition on abortion under the 8<sup>th</sup> amendment. Despite exceptions being carved out by the *X* case in 1992, it took 21 years for the PLDPA 2013 to clarify how the exceptions would operate in practice. We argue that this illustrates a culturally embedded restrictive approach to abortion access as even where exceptions were theoretically possible, they were not practically obtainable.

We also argue that this socio-cultural context of abortion in Ireland, and in particular the social contestation means that there has been an inherent tendency for the law to be interpreted narrowly in practice. It is likely this inherent tendency to adopt restrictive applications of the law could continue to influence the Irish abortion context in future, including the interpretation of the HRTPA. It is in such contexts that international law can prove a vital tool to move certain issues beyond contestation by providing affirmative obligations to protect certain minimum standards of access to abortion. This point is returned to in section F below.

## II. Campaign to Repeal the 8<sup>th</sup> Amendment

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<sup>25</sup> Alison O'Connor, "How the death of Savita Halappanavar changed the abortion debate" (*Irish Examiner*, 28<sup>th</sup> October 2017) available at <https://www.irishexaminer.com/viewpoints/analysis/how-the-death-of-savita-halappanavar-changed-the-abortion-debate-461787.html>

<sup>26</sup> Michelle Hennessy, "Vigils held around the country for Savita Halappanavar" (*The Journal*, 15<sup>th</sup> November 2012) available at <https://www.thejournal.ie/savita-vigil-675072-Nov2012/>; "Thousands attend Savita vigils around the country" (*Irish Times*, 17<sup>th</sup> November, 2012) available at <https://www.irishtimes.com/news/thousands-attend-savita-vigils-around-the-country-1.749469?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fthousands-attend-savita-vigils-around-the-country-1.749469>; Ben Quinn, "Vigil held at Irish embassy in London to protest over 'denied abortion' death" (*The Guardian*, 14<sup>th</sup> November 2012) available at <https://www.theguardian.com/world/2012/nov/14/abortion-protesters-vigil-irish-embassy-london>

<sup>27</sup> Christine Bohan, "Calls for X Case legislation after woman denied an abortion dies in Galway hospital" (*The Journal*, 14<sup>th</sup> November 2012) available at <https://www.thejournal.ie/savita-praveen-halappanavar-abortion-galway-hospital-673590-Nov2012/>; Sinead O'Carroll, "Savita Halappanavar: Her tragic death and how she became part of Ireland's abortion debate" (*The Journal*, 29<sup>th</sup> April 2018) available at <https://www.thejournal.ie/eighth-amendment-4-3977441-Apr2018/>

<sup>28</sup> In March 2018, the Irish Supreme Court in *M & ors v. Minister for Justice and Equality & ors* [2018] IESC 14 confirmed that the 'unborn' does not have rights under the Constitution outside Art 40.3.3. For a discussion, see: Shane Phelan, "Unborn does not have rights beyond right to life in Eighth Amendment, Supreme Court rules" (*Irish Independent*, 7<sup>th</sup> March 2018) available at <https://www.independent.ie/irish-news/courts/unborn-does-not-have-rights-beyond-right-to-life-in-eighth-amendment-supreme-court-rules-36679324.html>

For those who had spent a lifetime campaigning for change to broaden abortion access, the PLDPA was not sufficient.<sup>29</sup> Demand for abortion in Ireland was high: from 1980-2017, over 170,000 women travelled from Ireland to access abortion services in another European country.<sup>30</sup> Many others procured abortions by taking illegal abortion pills in Ireland. Women who had terminations had limited or no aftercare, and those who had taken illegal pills feared prosecution. In September 2013, 12 organisations came together to form the Coalition to Repeal the 8<sup>th</sup> Amendment.<sup>31</sup>

Between November 2016 and April 2017, the 8<sup>th</sup> amendment was examined by the Citizen's Assembly, a group of 99 citizens and a chairperson tasked to consider selected legal and policy issues affecting Ireland.<sup>32</sup> The majority of the Citizen's Assembly recommended that the 8<sup>th</sup> amendment should be repealed and replaced by a provision authorizing the Oireachtas to legislate on the issue of termination of pregnancy.<sup>33</sup> This was perceived by politicians and the media as a clear call for change from representatives of society. The discussions and votes of the Citizen's Assembly were publicly reported which helped move the debate away from historically entrenched positions as the Assembly considered issues outside the traditional anti-abortion/pro-choice dichotomy and religious contexts. During this same period (2016-2017) the UN Human Rights Committee considered two separate complaints from women whose pregnancies had fatal abnormalities, and who had to travel to the UK for a termination of pregnancy.<sup>34</sup> In both complaints, the Committee was of the view that Ireland had violated various provisions of the 1966 International Covenant on Civil and Political Rights. Although these views were reported in the media at the time, they did not have particular salience in the debate in the lead up to the referendum.<sup>35</sup> This lack of salience arguably stemmed from the (incorrectly held) position that these views had no role in the domestic context. Indeed, the then-Taoiseach Enda Kenny dismissed these Committee views by stating they were not 'binding' as the decision of a court might be.<sup>36</sup> In addition, some perceived international law as a technocratic

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<sup>29</sup> See: Harry McGee, "How the Yes and No sides won and lost the abortion referendum" (*Irish Times*, 26 May 2018) available at <https://www.irishtimes.com/news/politics/how-the-yes-and-no-sides-won-and-lost-the-abortion-referendum-1.3509924>

<sup>30</sup> Orla Ryan, "Q&A: Here's how many women and girls travel to the UK for abortions" (*The Journal*, 7<sup>th</sup> May 2018) available at <https://www.thejournal.ie/how-many-irish-travel-to-uk-for-abortions-3986043-May2018/>

<sup>31</sup> See: Harry McGee, "How the Yes and No sides won and lost the abortion referendum" (*Irish Times*, 26 May 2018) available at <https://www.irishtimes.com/news/politics/how-the-yes-and-no-sides-won-and-lost-the-abortion-referendum-1.3509924>

<sup>32</sup> The Citizen's Assembly was established by government and terms of reference for the Assembly were agreed upon by Dáil Éireann in July 2016, to consider five key issues, one of which was the 8th amendment and to report and make recommendations on these to the Houses of the Oireachtas. See <https://www.citizensassembly.ie/en/About-the-Citizens-Assembly/Background/>. For a discussion of the submissions to the Citizens Assembly on the eighth amendment, see Fiona de Londras & Mima Markicevic, "Reforming abortion law in Ireland: Reflections on the public submissions to the Citizens' Assembly" (2018) 70 *Women's Studies International Forum* 89-98.

<sup>33</sup> See <https://www.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitution/>

<sup>34</sup> Human Rights Committee, *Siobhán Whelan v Ireland*, 12 June 2017, UN Doc CCPR/C/119/D/2425/2014; Human Rights Committee, *Amanda Jane Mellet v Ireland*, 9 June 2016, UN Doc CCPR/C/116/D/2324/2013.

<sup>35</sup> See the views of the public as described in Fiona de Londras & Mima Markicevic, "Reforming abortion law in Ireland: Reflections on the public submissions to the Citizens' Assembly" (2018) 70 *Women's Studies International Forum* 89-98.

<sup>36</sup> "UN abortion ruling is "not binding", Enda Kenny says," (*Irish Times*, 15 June 2016) available at <http://www.irishtimes.com/news/politics/un-abortion-ruling-is-not-binding-enda-kenny-says-1.2684762>. The Taoiseach is Ireland's equivalent to Prime Minister.



issue that has little to do with the core of abortion debate.<sup>37</sup> As demonstrated in section C below, this is a narrow view of the role of international law in this context, which was deeply unfortunate as had Ireland taken its obligations more seriously, change could have been urged sooner.

Nonetheless, the momentum towards change grew when all main political party leaders announced their support for the repeal movement. Micheál Martin (leader of the opposition Fianna Fáil party) announced on 19<sup>th</sup> January 2018 that he would campaign to repeal the 8<sup>th</sup> amendment, even though up until that point he had been on record as being against abortion access. Martin's u-turn may have been a catalyst for other political figures to come out in support of the repeal movement. Hours after his announcement, Taoiseach Leo Varadkar also announced his support for repeal, after months of criticism over his ambiguous stance. In a significant change of position, Minister for Foreign Affairs Simon Coveney made a similar announcement. However, key figures in all three main parties – Fine Gael, Fianna Fáil, and Sinn Féin – took different sides in the debate. Some 26 Teachtaí Dála voted against allowing any referendum on the 8<sup>th</sup> amendment,<sup>38</sup> most of which were from the Fianna Fáil party. Nonetheless, the vote to allow an amendment passed with a majority of 97 to 26,<sup>39</sup> and a referendum was announced for 25<sup>th</sup> May 2018.

Both the yes (for repeal of the 8<sup>th</sup> amendment) and no (for retention of the 8<sup>th</sup> amendment) sides campaigned actively in the lead up to the referendum. Throughout the campaign the polls showed a lead for the yes side, but they were still consistently below the 51% necessary to win the referendum.<sup>40</sup> Both sides dedicated the final weeks of the campaign to winning the voters who were undecided. A key point of contention was the Government's proposition to legalise abortion for any reason up to 12 weeks. The no side portrayed this as 'abortion on demand' whereas the yes side argued that there were no workable alternatives to the 12-week limit if the 'hard cases' such as rape were to be accommodated.

On 25<sup>th</sup> May 2018, 66.40% of the electorate voted to repeal the 8<sup>th</sup> amendment. Although it is near-impossible to precisely identify why the 'yes' campaign was successful, the RTÉ (Irish National Broadcaster) exit poll asked voters reasons for their decision and this gives us some insight into the minds of voters.<sup>41</sup> Respondents stated that the key factors that influenced their vote were people's personal stories as covered in the media (43%), and experiences of people they knew (34%).

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<sup>37</sup> Fiona de Londras & Mima Markicevic, "Reforming abortion law in Ireland: Reflections on the public submissions to the Citizens' Assembly" (2018) 70 *Women's Studies International Forum* 89-98.

<sup>38</sup> Teachtaí Dála are Members of Parliament.

<sup>39</sup> Sarah Bardon, Marie O'Halloran & Michael O'Regan, "Abortion referendum to go ahead following Dáil vote" (*Irish Times*, 21<sup>st</sup> March 2018) available at <https://www.irishtimes.com/news/politics/oireachtas/abortion-referendum-to-go-ahead-following-dail-vote-1.3435008>

<sup>40</sup> "Irish Times/Ipsos MRBI poll: Nothing can be taken for granted" (*Irish Times*, 20<sup>th</sup> April 2018) available at <https://www.irishtimes.com/opinion/editorial/irish-times-ipsos-mrbi-poll-nothing-can-be-taken-for-granted-1.3467487?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fopinion%2Feditorial%2Firish-times-ipsos-mrbi-poll-nothing-can-be-taken-for-granted-1.3467487>

<sup>41</sup> RTE estimated a 68% yes vote and 32% no vote. The poll surveyed voters across all constituencies in Ireland, available at <https://www.rte.ie/news/2018/0525/965899-eighth-amendment/>. In the key weeks leading up to the referendum, the 'Cervical Check' scandal was publicized. This involved the misdiagnosis of women's cervical smear results as normal

The referendum result went starkly against the Catholic church's call for a 'no' vote.<sup>42</sup> It demonstrates the church's declining influence,<sup>43</sup> contributed to by clerical sexual abuse scandals and arguably also by its historic poor treatment of pregnant women, single mothers and children.<sup>44</sup> Indeed, the church's handling of clerical sexual abuse and its treatment of women in Magdalen Laundries has recently been criticised within the international human rights contexts,<sup>45</sup> including by the Committee on Rights of Child.<sup>46</sup>

The referendum result was highly significant because it allowed the Oireachtas for the first time in 35 years since the introduction of the 8<sup>th</sup> amendment to enact laws relating to abortion. The repeal vote presented Ireland with the opportunity to move away from reactionary laws and adopt a reformed framework for abortion access which could also ensure compliance with Ireland's international treaty obligations.<sup>47</sup> In the sections which follow, we assess both why compliance with international law is important and also to what extent this has been achieved by the HRTPA.

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which delayed early intervention treatment in the many cases. Some women were not diagnosed until they were terminally ill, and the mistakes were subsequently concealed within the healthcare system. Although exit polls suggested that the referendum would have passed comfortably regardless of the Cervical Check scandal, nonetheless, the scandal was seen by some as further evidence of the lack of control women had over their reproductive care. See Linda Kiernan, "For Irish women it's not just abortion rights that are on the ballot this week" (*The Independent*, 24 May 2018) available at <https://www.independent.co.uk/life-style/health-and-families/ireland-abortion-referendum-women-rights-cervical-screening-eighth-amendment-a8363061.html>

<sup>42</sup> See Jon O'Brien, "Catholics have evolved in their thinking about abortion" (*Irish Times*, 16<sup>th</sup> January 2018) available at <https://www.irishtimes.com/opinion/catholics-have-evolved-in-their-thinking-about-abortion-1.3356297?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fopinion%2Fcatholics-have-evolved-in-their-thinking-about-abortion-1.3356297>

<sup>43</sup> Denise Calnan, "Abortion vote shows Catholic Church is losing influence in Ireland – archbishop" (*Irish Independent*, 27<sup>th</sup> May, 2018) available at <https://www.independent.ie/irish-news/abortion-referendum/abortion-vote-shows-catholic-church-is-losing-influence-in-ireland-archbishop-36950981.html>

<sup>44</sup> For example, recent reports estimating that nearly 800 children died between 1925 and 1961 at a mother and baby home in Tuam, Co Galway. Significant quantities of human remains were subsequently found there - see "Tuam babies: Church must address 'shameful chapter'" (*BBC News*, 27<sup>th</sup> August 2018) available at <https://www.bbc.com/news/world-europe-45324302>

<sup>45</sup> The Magdalene Laundries in Ireland were institutions of confinement for pregnant women (often unmarried women) generally run by Roman Catholic orders, operating from the 18<sup>th</sup> to the late 20<sup>th</sup> centuries. For details of the conditions within the laundries, see: Patsy McGarry, "Magdalene laundries: 'I often wondered why were they so cruel'" (*The Irish Times*, 6<sup>th</sup> June 2018) available at <https://www.irishtimes.com/news/social-affairs/religion-and-beliefs/magdalene-laundries-i-often-wondered-why-were-they-so-cruel-1.3521600>; Ed O'Loughlin, "These Women Survived Ireland's Magdalene Laundries. They're Ready to Talk." (*New York Times*, 6<sup>th</sup> June 2018) available at <https://www.nytimes.com/2018/06/06/world/europe/magdalene-laundry-reunion-ireland.html>; Laura Lynott, "'Our identities were taken, we were locked up. Our hair was cut short, our names were taken' - survivors of the Magdalene Laundry" (*Irish Independent*, 5<sup>th</sup> June 2018) available at <https://www.independent.ie/irish-news/our-identities-were-taken-we-were-locked-up-our-hair-was-cut-short-our-names-were-taken-survivors-of-the-magdalene-laundry-36978216.html>

<sup>46</sup> See Paddy Agnew, "Reputation of church 'placed above children's best interests'" (*Irish Times*, 5<sup>th</sup> February 2014) available at <https://www.irishtimes.com/news/world/europe/reputation-of-church-placed-above-children-s-best-interests-1.1680285>

<sup>47</sup> The key developments of note in this context are *A, B and C v Ireland* App No 25579/05 (ECHR, 16 December 2010) and also Human Rights Committee, *Siobhán Whelan v Ireland*, 12 June 2017, UN Doc CCPR/C/119/D/2425/2014; Human Rights Committee, *Amanda Jane Mellet v Ireland*, 9 June 2016, UN Doc CCPR/C/116/D/2324/2013.

### C. The relevance of international law

This section first sets out why international law should be considered in the context of Ireland's new abortion laws from a legal perspective. It then provides a normative case for why it is useful and important for States to take account of international human rights law in reforming domestic abortion laws.

#### I. Taking account of international law in the abortion context: A legal argument

At the outset, it should be noted that there is no general right to an abortion under international law *per se*. However, six treaties set out rights that are relevant in the abortion context, as detailed in section D below.<sup>48</sup> These treaties are binding on Ireland, and thus “must be performed in good faith”.<sup>49</sup> In addition, Article 27 of the Vienna Convention on the Law of Treaties (VCLT) provides that: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”,<sup>50</sup> - in other words, domestic law is no defence for failing to comply with international obligations. Indeed, this position was reiterated recently by the Human Rights Committee (HRC) in *Mellet v Ireland* and *Whelan v Ireland* and has been noted by the Irish Supreme Court.<sup>51</sup> Thus, States are under a legal duty to perform their international law obligations in good faith.

Furthermore, it is not just the treaties themselves which are relevant but also how they are interpreted in practice. The content and substance of international treaty obligations are set out in detail by their respective treaty monitoring bodies (TMBs) and, in the case of the European Convention on Human Rights, the European Court of Human Rights (ECtHR). These institutions have “extensive experience in articulating legal standards around abortion access, including in situations where there is deep division and disagreement about how access to abortion ought to be protected by international human rights law.”<sup>52</sup> Decisions of the ECtHR are binding on states,<sup>53</sup> whereas the views of TMBs are not. However, TMBs views should be taken seriously because they are treated as authoritative interpretations of binding treaty obligations.<sup>54</sup> For example, the HRC is a body of

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<sup>48</sup> These are the 1966 International Covenant of Civil and Political Rights (monitored by the Human Rights Committee (HRC)); the 1966 International Covenant on Economic, Social, and Cultural Rights (monitored by the Committee on Economic, Social, and Cultural Rights); the 1980 Convention Against Torture (monitored by the Committee Against Torture); the 1979 Convention on the Elimination of Discrimination Against Women (monitored by Committee on the Elimination of Discrimination Against Women); the 2006 Convention on the Rights of Persons with Disabilities (monitored by the Committee on the Rights of Persons with Disabilities) and the 1989 Convention on the Rights of the Child (monitored by Committee on the Rights of the Child).

<sup>49</sup> Art 26 VCLT

<sup>50</sup> See discussion in Siobhan Mullally, “Mellet v Ireland: Legal Status of the UN Human Rights Committee’s ‘Views’” CCJHR Blog (16 June 2017) available at <http://blogs.ucc.ie/wordpress/ccjhr/2016/06/16/mellet-v-ireland-legal-status-un-human-rights-committees-views-2/> This principle is reiterated in the International Law Commission (ILC) Draft Articles on State Responsibility Internationally Wrongful Acts, Art 3 & Art 32. A general duty to bring internal law into conformity with obligations under international law has been affirmed by the Permanent Court of International Justice (PCIJ) (*Exchange of Greek and Turkish Populations, Advisory Opinion*, PCIJ Series B no 10, ICJ 277 (PCIJ 1925)).

<sup>51</sup> Murray J in *McD. v L. & anor* [2009] IESC 81.

<sup>52</sup> Fiona de Londras and Mairéad Enright, *Repealing the 8th: Reforming Irish Abortion Law* (Policy Press, 2018), at 37.

<sup>53</sup> Art 46 ECHR.

<sup>54</sup> Art 28 ICCPR provides that the HRC’s members “shall be persons of high moral character and recognized competence in the field of human rights.” Art 38(1)(d) of the Statute of the International Court of Justice also provides that the views of experts are a subsidiary source of international law. Charter of the United Nations and Statute of the International Court of Justice, *entry into force* 24 October 1945, 1 U.N.T.S. XVI. A McMahon and B Ní Ghráinne, “Access

independent experts established by Art 28 of the ICCPR that monitors the implementation of the ICCPR.<sup>55</sup> It does this in various ways, including by way of a reporting procedure (whereby states regularly report to the HRC and the HRC issues ‘concluding observations’); and by publishing its interpretation of the content of human rights provisions, known as General Comments.

Of particular relevance for this article is the ability of TMBs to receive communications from individuals against certain states – such as Ireland – who have provided their consent for this procedure.<sup>56</sup> The HRC can forward its ‘views’ to the State Party concerned and to the individual.<sup>57</sup> As aforementioned, these views are not directly binding on states.<sup>58</sup> However they “exhibit some important characteristics of a judicial decision” because “they are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.”<sup>59</sup>

Therefore, from a legal perspective, we have established that international law should be complied with in this context.

## II. *Taking account of international law in the abortion context: A normative case*

Prior to assessing the HRTPA compliance with international law, aside from the legal rationales for abiding by international law obligations, we also put forward six key normative reasons why states should abide by such obligations.

First, Ireland has ratified the relevant international treaties referred to above and in doing so, Ireland has indicated its willingness to abide by such treaty obligations in good faith. Failing to do so goes

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to Abortion in Cases of Fatal Fetal Abnormality: A New Direction for the European Court of Human Rights?” *Human Rights Law Review* (Forthcoming).

<sup>55</sup> *Ibid.*

<sup>56</sup> See, Optional Protocol to the International Covenant on Civil and Political Rights, *entry into force* 23 March 1976, 999 U.N.T.S. 171. Art. 1 provides that: “A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.” All Council of Europe states with the exception of Switzerland and the United Kingdom are a party to the First Optional Protocol.

<sup>57</sup> States must be party to the Optional Protocol to the ICCPR, for the HRC to determine whether there has been a violation of the respective treaties and to provide a remedy where a violation is found. The term ‘protocol’ is used for an additional legal instrument that complements and adds to a treaty. The protocol is also a treaty. A protocol may be on any topic relevant to the original treaty and is used either to further address something in the original treaty, address a new or emerging concern or add a procedure for the operation and enforcement of the treaty—such as adding an individual complaints procedure. A protocol is ‘optional’ because it is not automatically binding on states that have already ratified the original treaty; states must independently ratify or accede to a protocol.

<sup>58</sup> A McMahon and B Ní Ghráinne, “Access to Abortion in Cases of Fatal Fetal Abnormality: A New Direction for the European Court of Human Rights?” *Human Rights Law Review* (Forthcoming).

<sup>59</sup> Moreover, “The views of the Committee under the Optional Protocol represent an *authoritative determination* [emphasis added] by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.” General Comment 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights 25 June 2009, CCPR/C/GC/33 at para 13.

against Ireland's international law commitments and if all states were to fail to comply in this manner, it would undermine the system of international law.

Second and relatedly, a State should also comply with its obligations for the purpose of safeguarding its international reputation. A state's failure to implement the HRC's views in a given case "becomes a matter of public record through the publication of the Committee's decisions inter alia in its annual reports to the General Assembly of the United Nations."<sup>60</sup> Abiding by international law obligations helps strengthen Ireland's reputation as a high compliance State which in turn impacts its standing in the international community. For example, Ireland's reputation as a high-compliance state is being relied on heavily in its bid for a seat at the UN Security Council, where it will compete against Canada and Norway to secure votes from two thirds of UN member states in June 2020.<sup>61</sup>

Third, given the often-controversial nature of abortion, we argue that international human rights are important for States to consider as they show patterns of common agreement on minimum human rights standards which States should move towards. The TMBs provide a birds-eye supranational view which is not enmeshed in national political or religious debates, as TMBs members represent a range of nationalities and they observe common practices in States in coming to their views. A counter-argument which could be raised to this point is that States are given a so-called 'margin appreciation' by the ECtHR on issues such as abortion given the sensitive moral issues at stake. However, the margin of appreciation tool is not generally used by UN TMBs, and the use of a European 'margin of appreciation' has been criticised in the context of abortion.<sup>62</sup>

Fourth, and relatedly, precisely because abortion is such a controversial issue in Ireland, the international human rights framework based on such commonly agreed standards is useful in shifting entrenched national positions. It could be seen as having provided a second mandate for the government to adopt the HRTPA i.e. to achieve compliance with international treaty regimes to which Ireland is party. It also provides a yardstick by which to evaluate and monitor the operation of the HRTPA by assessing its compliance with international human rights standards.

Fifth, and relatedly, some have argued that international law has a limited ability to influence social and legal domestic debates.<sup>63</sup> For example, international law may be seen as a technocratic issue that has little to do with the core of abortion debate, which seems to revolve around core questions

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<sup>60</sup> Para 17, General Comment 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights 25 June 2009, CCPR/C/GC/33.

<sup>61</sup> "Taoiseach to launch campaign for UN Security Council seat" (*Irish Times*, 1st July 2018) available at <https://www.irishtimes.com/news/crime-and-law/taoiseach-to-launch-campaign-for-un-security-council-seat-1.3550436>

<sup>62</sup> See generally, Fiona de Londras, "When the European Court of Human Rights Decides not to Decide: The Cautionary Tale of A, B & C v Ireland and Referendum-Emergent Constitutional Provisions" in Panos Kapotas and Vassilis Tzevelekos (eds), *Building Consensus on European Consensus* (Cambridge University Press, 2019); Fiona de Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave, 2018) 120; Daniel Fenwick, "Abortion jurisprudence" at Strasbourg: deferential, avoidant and normatively neutral? (2014) 34(2) *Legal Studies* 214.

<sup>63</sup> Charlesworth, Chinkin and Wright also point out that "the acquisition of rights must not be identified with automatic and immediate advances for women, and the limitations of the rights model must be recognized". However, "the notion of women's rights remains a source of potential power for women in international law. The challenge is to rethink that notion so that rights correspond to women's experiences and needs". Hilary Charlesworth, Christine Chinkin and Shelley Wright, "Feminist Approaches to International Law" (1991) *The American Journal of International Law* 613, 638.

of fetal rights and autonomy.<sup>64</sup> In the Irish context, as noted, there is a long-entrenched deference to the Catholic teachings which place a priority on fetal life.<sup>65</sup> This argument may explain why technical arguments about legal principles were not salient in the lead up to the referendum. However, now that the core socially contested issue has been decided (whether or not the Constitution should protect fetal life), and legislation has been put in place, this legislation must be monitored over time to ensure effective provision for abortion access, and to comply with the State's minimum international law obligations. This in essence is a technical task, carried out by courts and lawyers if legal challenges are taken, or by politicians if there are attempts at future reform of the law, rather than laypeople. It is thus entirely appropriate that Ireland's international law obligations are taken into account in this process.

Sixth, one of the key motivations for individuals who voted in favour of repealing the 8<sup>th</sup> amendment, as documented by opinion polls noted above, was the suffering of women known to them, and the personal stories expressed in the media. If the Irish government is to be seen as having taken this motivation of voters seriously, this poses questions of: 1) does the adopted HRTPA as drafted protect and address women's interests?; 2) how do we ensure that the HRTPA is interpreted and applied in practice in a way which gives practical and meaningful access to abortion on the grounds set out?; and 3) how do we prevent backsliding in the interpretation of the HRTPA i.e. the adoption of more stringent interpretations of the law in practice then necessarily required by law evident in Savita Halappanavar and Shelia Rodgers cases? International human rights law provides a useful framework within this context for thinking about how best to evaluate the HRTPA, and also, as a means to safeguard the practical delivery of abortion access. More broadly, having laws which have been drafted and are applied in practice to reflect women's lived experiences is of utmost importance to feminist scholarship,<sup>66</sup> which emphasises the need to take women's voices seriously.

Moreover, the TMBs have specifically considered individual stories of women in Ireland who required abortions, and have shown how Irish law in the past failed to protect such women. Thus, their views are of the utmost relevance to the evaluation of the newly adopted HRTPA for compliance with international law and in the monitoring of how such laws are applied in practice over time.

#### **D. What are Ireland's international law obligations concerning access to abortion?**

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<sup>64</sup> Fiona de Londras & Mima Markicevic, "Reforming abortion law in Ireland: Reflections on the public submissions to the Citizens' Assembly" (2018) 70 *Women's Studies International Forum* 89-98.

<sup>65</sup> Fiona de Londras & Mima Markicevic, "Reforming abortion law in Ireland: Reflections on the public submissions to the Citizens' Assembly" (2018) 70 *Women's Studies International Forum* 89-98.

<sup>66</sup> Christine Littleton, "Feminist Jurisprudence: The Difference Method Makes" (Book Review) (1989) 41 *Stan. L. Rev* 751, 764 as cited in Charlesworth, Christine Chinkin and Shelley Wright, "Feminist Approaches to International Law" (1991) *The American Journal of International Law* 613, 638. See also: Rosemary Hunter, Clare McGlynn and Erika Rackley, *Feminist Judgments from Theory to Practice* (Hart Publishing, 2010) chapters 1 and 2; Rosemary Hunter, "Can feminist judges make a difference?" (2008) 1-2 *International Journal of the Legal Profession* 7-36.

As aforementioned, there is no general right to an abortion under international law. However, Ireland's previous legal framework under the 8<sup>th</sup> amendment was strongly criticised by several bodies, including the Committee on the Rights of the Child (CRC), the Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Discrimination against Women (CEDW), and the ECtHR. The repeal of the 8<sup>th</sup> amendment provided Ireland with a prime opportunity to bring its laws in line with these international obligations. These obligations are listed here briefly and elaborated upon further in following sections, in assessing the extent to which the reformed framework under the HRTPA complies with such obligations. It should be noted that this is a non-exhaustive and non-hierarchical list which includes the main minimum obligations TMBs appear agreeable on.

- *States should, at a minimum, provide for abortion where the pregnancy is a result of rape or incest; in cases of fatal foetal abnormality; and where the women's health or life is at risk.*<sup>67</sup>
- *Abortion must be decriminalised in all circumstances.*<sup>68</sup> According to the CESCR, criminalization of abortion undermines autonomy and the right to equality and non-discrimination. Decriminalization should also extend to health-care providers who provide abortion services, or who supply information on safe abortion services abroad.<sup>69</sup>

<sup>67</sup> ICCPR, Concluding observations on the fourth periodic report of Ireland, 19 August 2014, CCPR/C/IRL/CO/4; Committee on Economic, Social and Cultural Rights, Concluding observations on the third periodic report of Ireland, 8 July 2015, E/C.12/IRL/CO/3 at para 30; CEDAW/C/50/D/22/2009, *LC v Peru* Communication No. 22/2009, 4 November 2011; CEDAW, Concluding observations on the 7th and 8th periodic reports of Peru, 11 January 2017, CEDAW/C/PER/CO/7-8 at para 36; CEDAW, Concluding observations on the combined sixth and seventh periodic reports of Ireland, 9 March 2017, CEDAW/C/IRL/CO/6-7 at para 43; C Zampas and JM Gher, "Abortion as a Human Right – International and Regional Standards" (2008) 8(2) *Human Rights Law Review* 249. However, the Committee on the Rights of Persons with Disabilities has been critical of providing abortion on the grounds of fatal fetal abnormality. See Committee on the Rights of Persons with Disabilities, "Comments on the Draft General Comment No. 36 of the Human Rights Committee on article 6 of the International Covenant on Civil and Political Rights" (2017) at para 1, available at <https://www.ohchr.org/en/hrbodies/ccpr/pages/gc36-article6righttolife.aspx>. The Committee stated "Laws which explicitly allow for abortion on grounds of impairment violate the Convention on the Rights of Persons with Disabilities (Art., 4,5,8). Even if the condition is considered fatal, there is still a decision made on the basis of impairment."

<sup>68</sup> According to Fiona de Londras, the decision in *Mellet*, and by extension we would argue *Whelan*, at least implies, and the concurring opinions establish, that criminalisation of abortion *per se* is a violation of the ICCPR. See, Fiona de Londras, "Fatal Foetal Abnormality, Irish Constitutional Law and *Mellet v Ireland*" (2016) 24(4) *Medical Law Review* 591. See also: Committee on Economic, Social and Cultural Rights, Concluding observations on the third periodic report of Ireland, 8 July 2015, E/C.12/IRL/CO/3 at para 30; Fiona de Londras and Enright argue that the constitutional right to bodily integrity also entails that the state is required to decriminalize abortion, see Fiona de Londras and Mairead Enright, *Repealing the 8<sup>th</sup>* (Policy Press, 2018) at 41, and also see 86; CEDAW has said that the criminalisation, denial, or delay of safe abortion or post abortion care are "forms of gender-based violence that...may amount to torture or cruel, inhuman or degrading treatment." in CEDAW, General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19, 14 July 2017, CEDAW/C/GC/35 at para 18; CCPR/C/IRL/CO/4; Committee on Economic, Social and Cultural Rights, Concluding observations on the third periodic report of Ireland, 8 July 2015, E/C.12/IRL/CO/3 at para 30; Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2<sup>nd</sup> May 2016, E/C.12/GC/22 at para 40 and 57; CEDAW, General Recommendation No. 24, Article 12 of the Convention (Women and Health), 1999, at para 31; CEDAW, Concluding observations on the combined sixth and seventh periodic reports of Ireland, 9 March 2017, CEDAW/C/IRL/CO/6-7 at 43; Convention on Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, 1 March 2016, CRC/C/IRL/CO/3-4 at para 57 and 58.

<sup>69</sup> Convention on Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, 1 March 2016, CRC/C/IRL/CO/3-4 at para 58(a); CEDAW Concluding Observations: Ireland, on the combined sixth and seventh periodic reports of Ireland, 9 February 2017, CEDAW/C/IRL/CO/6-7 at para 42 and 43; ICCPR, Concluding observations on the fourth periodic report of Ireland, 19 August 2014, CCPR/C/IRL/CO/4, see also discussion of effects

- *Abortion legislation and/or appropriate guidelines must make it clear when and how the law applies, both substantively and procedurally.*<sup>70</sup> In examining the previous Irish legal framework, the CRC was concerned about the PLDPA, and how the lack of clarity surrounding the term ‘real and substantial risk’ prevented doctors from being able to provide services in accordance with objective medical practice.<sup>71</sup>
- *States should make information on crisis pregnancy options available through a variety of channels.*<sup>72</sup> The CEDAW previously criticised the Regulation of Information (Services outside the State for the Termination of Pregnancies) Act of 1995, which criminalised the advocacy and promotion of abortion abroad, meaning that healthcare providers cannot freely provide information for fear of prosecution.<sup>73</sup> In *Mellet*, Víctor Rodríguez Rescia, Olivier de Frouville, and Fabián Salvioli found in their Individual Opinion (concurring), that Ireland had violated Article 19(2) of the ICCPR for failing to provide critical information on abortion services abroad to a pregnant woman whose fetus had a fatal abnormality. The referral of Ms Mellet to a private counsellor who gave her partial information did not discharge the State’s obligation to provide information in this respect.
- *Abortion services must be effective, timely, and practically accessible.*<sup>74</sup> CEDAW noted that “inaccessibility because of distance and/or travel barriers constitute a barrier to appropriate healthcare for women, compromising the right to non-discrimination in the area of health” and that it is discriminatory for a State to refuse to legally provide for the performance of

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of criminalization in: Human Rights Committee, *Siobhán Whelan v Ireland*, 12 June 2017, UN Doc CCPR/C/119/D/2425/2014; Human Rights Committee, *Amanda Jane Mellet v Ireland*, 9 June 2016, UN Doc CCPR/C/116/D/2324/2013.

<sup>70</sup> ICCPR, Concluding observations on the fourth periodic report of Ireland, 19 August 2014, CCPR/C/IRL/CO/4; Committee on Economic, Social and Cultural Rights, Concluding observations on the third periodic report of Ireland, 8 July 2015, E/C.12/IRL/CO/3 at para 30.

<sup>71</sup> Convention on Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, 1 March 2016, CRC/C/IRL/CO/3-4.

<sup>72</sup> ICCPR, Concluding observations on the fourth periodic report of Ireland, 19 August 2014, CCPR/C/IRL/CO/4; Committee on Economic, Social and Cultural Rights, Concluding observations on the third periodic report of Ireland, 8 July 2015, E/C.12/IRL/CO/3; Committee on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, E/C.12/GC/22.

<sup>73</sup> CEDAW Concluding Observations: Ireland, on the combined sixth and seventh periodic reports of Ireland, 9 February 2017, CEDAW/C/IRL/CO/6-7 at para 42(d).

<sup>74</sup> ICCPR, Concluding observations on the fourth periodic report of Ireland, 19 August 2014, CCPR/C/IRL/CO/4; Human Rights Committee, *Siobhán Whelan v Ireland*, 12 June 2017, UN Doc CCPR/C/119/D/2425/2014; Human Rights Committee, *Amanda Jane Mellet v Ireland*, 9 June 2016, UN Doc CCPR/C/116/D/2324/2013; See also Concluding Observations on Peru (1996) UN Doc. CCPR/C/79/Add. 67 at para 15; Concluding Observations on Lesotho (1999) CCPR/C/79/Add. 106 at para 11; Concluding Observations on Chile (1999) UN Doc. CCPR/C/79/Add. 194; Concluding Observations on Ecuador (1998) UN Doc. CCPR/C/79/Add. 92; Concluding Observations on the Republic of Moldova (1992) UN Doc. CCPR/CO/75/MDA; Concluding Observations on Paraguay UN Doc. CCPR/C/79/Add. 48 at para 17, & 28; Bolivia (1998) UN Doc. CCPR/C/79/Add. 73 at para 22; Colombia (1998) UN Doc CCPR/C/78/Add. 75 at para 24; Costa Rica (1999) UN Doc. CCPR/C/79/Add.107 at para 11; Senegal (1997) UN Doc. CCPR/C/79/Add. 82 at para 12; Tanzania (1998) UN Doc. See also CCPR/C/79Add.97 at para 15; Cameroon (1999) UN Doc. CCPR/C/79/Add. 116 at para 13; Poland (1999) UN Doc. CCPR/C/79/Add. 110 at para 11; Peru (2000) UN Doc. CCPR/CO/70/PER at para 20; Argentina (2000) UN Doc. CCPR/CO/70/ARG at para 14; Vietnam (2002) UN Doc. CCPR/CO/75/VNM at para 14; Guatemala (2001) UN Doc. CCPR/CO/72/GTM at para 19. CEDAW has said that the criminalisation, denial, or delay of safe abortion or post abortion care are ‘forms of gender-based violence that...may amount to torture or cruel, inhuman or degrading treatment.’ CEDAW, General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19, 14 July 2017, CEDAW/C/GC/35 at para 18.



certain reproductive health services for women.<sup>75</sup> In addition, the ECtHR has repeatedly found violations of the ECHR where abortion is provided for on particular grounds under domestic law but is inaccessible in practice.<sup>76</sup> The ECtHR has taken issue in the past with the lack of clarity under the previous Irish legal framework, pointing out that uncertainty in the law can have a “significant chilling factor for both women and doctors in the medical consultation process” concerning abortions.<sup>77</sup> It has also found Poland in violation of the ECHR for, *inter alia*, failing to provide for timely access to abortion services.<sup>78</sup>

- *States must provide quality post-abortion care irrespective of whether individuals have undergone a legal or illegal abortion.*<sup>79</sup> This obligation was emphasized by the CRC, which recommended that Ireland review its former legislation with a view to ensuring access by children to safe abortion and post-abortion care services; and to ensure that the views of the pregnant girl are always heard and respected in abortion decisions.<sup>80</sup>
- *States have an obligation to ensure that women do not need to put their lives at risk by procuring illegal abortions.*<sup>81</sup>
- *States must strengthen services for the prevention of pregnancy through family planning.*<sup>82</sup> The CRC was particularly concerned at the severe lack of access to sexual and reproductive health education and emergency contraception for adolescents in Ireland,<sup>83</sup> and the CEDAW

<sup>75</sup> CEDAW, General Recommendation No. 24, Article 12 of the Convention (Women and Health), 1999.

<sup>76</sup> These cases include: *Tysiąc v Poland* App No 5410/03 (ECHR 20 March 2007); *R.R. v Poland* App no 27617/04 (ECHR, 26 May 2011); *A, B and C v Ireland* App No 25579/05 (ECHR 16 December 2010) and *P. and S. v Poland* App No 57375/08 (ECHR, 30 October 2012).

On the other hand, the ECtHR has generally bestowed a wide margin of appreciation on States on abortion issues and has not generally interfered with domestic practice to date on such issues when Art 8 (right to private and family life) is raised. For a discussion of the ECtHR’s jurisprudence on Article 8 ECHR see generally: Rosamund Scott, “Risks, Reasons and Rights: The European Convention on Human Rights and English Abortion Law” (2016) 24(1) *Medical Law Review* 1; Daniel Fenwick, “Abortion Jurisprudence” at Strasbourg: Deferential, Avoidant and Normatively Neutral? (2014) 34 *Legal Studies* 214; Daniel Fenwick, “The Modern Abortion Jurisprudence under Article 8 of the European Convention on Human Rights” (2013) 12 *Medical Law International* 249; Christina Zampas and Jaime M Gher “Abortion as a Human Right – International and Regional Standards” (2008) 8(2) *Human Rights Law Review* 249.

<sup>77</sup> *A, B and C v Ireland* App No 25579/05 (ECHR, 16 December 2010), at para 254.

<sup>78</sup> *P. and S. v Poland* App No 57375/08 (ECHR, 30 October 2012).

<sup>79</sup> General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2<sup>nd</sup> May 2016, E/C.12/GC/22; CEDAW, General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19, 14 July 2017, CEDAW/C/GC/35; CEDAW Concluding Observations: Ireland, on the combined sixth and seventh periodic reports of Ireland, 9 February 2017, CEDAW/C/IRL/CO/6-7 ; CRC, Concluding observations on the combined third and fourth periodic reports of Ireland 1 March 2016, CRC/C/IRL/CO/3-4; Committee against Torture, Concluding observations on the second periodic report of Ireland, 31 August, 2017, CAT/C/IRL/CO/2; see also discussion in Fiona de Londras and Mairéad Enright, *Repealing the 8<sup>th</sup>: Reforming Irish Abortion Law* (Policy Press, 2018) at 65-70.

<sup>80</sup> CRC, Concluding observations on the combined third and fourth periodic reports of Ireland, 1 March 2016, CRC/C/IRL/CO/3-4.

<sup>81</sup> Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018, CCPR/C/GC/36 at para 8; CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), 29 March 2000, CCPR/C/21/Rev.1/Add.10 at para 10.

<sup>82</sup> CEDAW, Thirty-third session 5-22 July 2005, Concluding comments: Ireland, CEDAW/C/IRL/CO/4-5; CEDAW, General Recommendation No. 24, Article 12 of the Convention (Women and Health), 1999.

<sup>83</sup> CRC, Concluding observations on the combined third and fourth periodic reports of Ireland, 1 March 2016, CRC/C/IRL/CO/3-4.

has called on Ireland to further strengthen family planning services, ensuring their availability to all women and men, young adults and teenagers.<sup>84</sup>

- *States must ensure non-discrimination between pregnant persons by ensuring equality of access concerning family planning and abortion, regardless of individual's socio-economic or other backgrounds.*<sup>85</sup> In *Mellet v Ireland*, Víctor Rodríguez Rescia, Olivier de Frouville and Fabián Salvioli noted in their Individual Opinion that there was discrimination, under the previous Irish legal framework between the complainant vis-à-vis other pregnant women who, by virtue of their more favorable socio-economic situation, were better placed to undergo an abortion abroad. In their opinion, this violated the prohibition of discrimination in Article 26. The CESCR voiced similar concerns about Ireland's former legislation.<sup>86</sup>
- *Religious practices should not be permitted to interfere with abortion access.*<sup>87</sup>

Having thus set out what Ireland's minimum international obligations in respect of its abortion framework are, the following section will set out whether Ireland's new framework under the HRTPA complies with these obligations.

### **E. Proposed Reforms of Irish Abortion Law: Compliance with International Law?**

The HRTPA repealed the Protection of Life During Pregnancy Act,<sup>88</sup> and introduced four grounds within which abortion is legally available in Ireland. Under, s. 12, the HRTPA made abortions available on request until 12 weeks of pregnancy. This ground is subject to confirmation from a medical practitioner that the pregnancy has not reached more than 12 weeks, and there must be a waiting period of 3 days between the certification of the pregnancy as under 12 weeks, and when a termination can be carried out.<sup>89</sup>

Abortions at any point beyond 12 weeks are only allowed under the HRTPA in the following circumstances:

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<sup>84</sup> CEDAW, Thirty-third session, 5-22 July 2005, Concluding comments: Ireland, CEDAW/C/IRL/CO/4-5, 22 July 2005.

<sup>85</sup> Committee on Economic, Social and Cultural Rights, Concluding observations on the third periodic report of Ireland, 8 July 2015, E/C.12/IRL/CO/3 at para 30.

<sup>86</sup> Committee on Economic, Social and Cultural Rights, Concluding observations on the third periodic report of Ireland, 8 July 2015, E/C.12/IRL/CO/3.

<sup>87</sup> See: Fiona de Londras and Mairead Enright who note that whilst doctors are entitled to genuinely held beliefs, that conscientious objections should not be used to impinge on pregnant peoples' "rights to access care, or lead to harmful or unjustified delays or obstruction in individual cases." in Fiona de Londras and Mairead Enright, *Repealing the 8th: Reforming Irish Abortion Law* (Policy Press, 2018) at 78. The authors cite the following sources: Committee on Economic, Social and Cultural Rights, Concluding Observations: Argentina, (2 December 2011) at para 22, E/C.12/ARG/CO/3; CEDAW, Concluding Observations: Hungary, (1 March 2013) at para 31(d), CEDAW/C/HUN/CO/7-8; CEDAW, 'General Recommendation No. 24: Article 12 of the Convention (Women and Health) (1999) A/54/38/Rev.1 at para 11; See also, Nils Muižnieks, Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, Following His Visit to Ireland from 22 to 25 November 2016 (29 March 2017), 95.

<sup>88</sup> Section 5, HRTPA. Other repeals under the HRTPA include: the Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995; and s. 10 of the Health (Family Planning) Act 1979.

<sup>89</sup> Section 12(3), HRTPA.

1. *For therapeutic reasons* – Abortions will be available where there is a risk to the life or of serious harm to the health of the pregnant woman as certified by two medical practitioners, in circumstances where the foetus has not reached viability,<sup>90</sup> and where it is “appropriate to carry out the termination of pregnancy in order to avert the risk”;<sup>91</sup>
2. *In emergency cases* - where a medical practitioner is of a reasonable opinion that there is an immediate risk to the life or of serious harm to the health of a pregnant woman and that a termination must be carried out immediately to avert that risk. This section does not refer to viability of the fetus, thus this provision has no time limit *per se*;<sup>92</sup>
3. *In cases of fatal foetal abnormality* - where two medical practitioners certify that the foetus is suffering from a condition which is likely to lead to the death of the foetus before birth or within 28 days of the birth.<sup>93</sup> This section does not refer to viability of the foetus, thus this provision has no time limit *per se*.

The HRTPA at least on paper addresses the minimum international law obligations set out above to provide for abortion in circumstances of fatal foetal abnormality, or where there is a threat to the life or health of the woman. However, seven main issues remain which could lead to the HRTPA being in breach of international law obligations.

First, at a general level, it remains to be seen whether the legal grounds upon which individuals can access abortion services under the HRTPA will be sufficiently clear in practice. Given the HRTPA's recent introduction it may be too early to tell whether issues relating to the clarity of the legal grounds for abortion under the Act will arise. However, concerns have recently been raised in the Dáil around the availability of terminations in cases of fatal fetal abnormality in Ireland, including, how this ground is being interpreted. There have been allegations that a woman whose pregnancy was diagnosed as having a fatal fetal abnormality was denied access to termination,<sup>94</sup> and that women continue to travel abroad for access to terminations in such cases.<sup>95</sup> As aforementioned the ECtHR previously found a violation of Article 8 ECHR because Ireland had failed to clarify when abortion was legally available under the exception set out by the *X* case.<sup>96</sup> The HRTPA could be

<sup>90</sup> Section 8, HRTPA states that: ““viability” means the point in a pregnancy at which, in the reasonable opinion of a medical practitioner, the foetus is capable of survival outside the uterus without extraordinary life-sustaining measures.”

<sup>91</sup> Section 9, HRTPA.

<sup>92</sup> Section 10, HRTPA.

<sup>93</sup> Section 11, HRTPA. One of the medical practitioners must be an obstetrician and the other of ‘relevant speciality’ under s. 11(2).

<sup>94</sup> Allegations were made in January 2019 that a woman whose pregnancy was diagnosed with fatal fetal abnormality was denied access to a termination in the Coombe hospital, see Cormac McQuinn and Eilish O'Regan, “Abortion for fatal foetal abnormality ‘denied in hospital’” (*Irish Independent*, 18<sup>th</sup> January 2019) available at <https://www.independent.ie/irish-news/health/abortion-for-fatal-foetal-abnormality-denied-in-hospital-37723983.html>; Subsequently, it was claimed that the condition was not a fatal abnormality but instead a ‘complex anomaly’ see Kitty Holland, “Coombe letter refusing abortion ‘suggests chilling effect’ of law” (*Irish Times*, 19<sup>th</sup> January 2019) available at <https://www.irishtimes.com/news/social-affairs/coombe-letter-refusing-abortion-suggests-chilling-effect-of-law-1.3763143?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fsocial-affairs%2Fcoombe-letter-refusing-abortion-suggests-chilling-effect-of-law-1.3763143>

<sup>95</sup> Cormac McQuinn, “Women still being forced to travel for abortions in tragic cases, Dáil told” (*Irish Independent*, 28<sup>th</sup> March 2019) available at <https://www.independent.ie/irish-news/health/women-still-being-forced-to-travel-for-abortions-in-tragic-cases-dil-told-37831880.html>

<sup>96</sup> *Attorney General v. X* [1992] 1 IR 1 [267].

challenged in future if it transpires that it is unclear in practice how to determine one's eligibility or the procedural avenues for obtaining an abortion under the grounds set out.

Second, and relatedly, concerns remain regarding the extent to which the abortion services provided for under the HRTPA will be practically accessible and timely.<sup>97</sup> There have been reports that pregnant persons from Ireland are continuing to travel to the UK for termination of pregnancy despite the availability of abortion in Ireland under the HRTPA since 1<sup>st</sup> January, with such reports suggesting that some individuals find the procedures under the HRTPA to be too "cumbersome".<sup>98</sup> Moreover, the fact that a second medical practitioner must be consulted before an abortion may be procured for therapeutic reasons or in cases of fatal foetal abnormality past the 12-week mark could prove an additional hurdle for an individual seeking a termination.

Third, the Act repeals the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995 but does not make provision for the type of information which should be provided in relation to abortion. Soon after the enactment of the HRTPA a 'bogus' website linked to an anti-abortion Facebook group, purporting to provide an abortion counselling services was set up, with a similar name as the HSE official referral service, My Options.<sup>99</sup> The HSE has since taken action against the owner of this website,<sup>100</sup> and proposals have been made to adopt new laws which would establish the role of digital safety commissioner and processes for the takedown of harmful digital communications.<sup>101</sup> The fact this occurred highlights gaps under the current framework, and future legislation is arguably required to safeguard access to non-directive, non-judgmental, and medically accurate information on abortion.<sup>102</sup> Arguably, failing to provide appropriate information could constitute a violation of the ICCPR as was the case in *Mellet*, as highlighted in section D above.

Third, it is important that where a doctor exercises their right to refuse to provide an abortion on the grounds of conscientious objection, that the pregnant person is referred to another practitioner who is willing to provide the abortion requested.<sup>103</sup> This is expressly provided for in section 22(3) of

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<sup>97</sup> Article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11. See also: Fiona de Londras and Mairéad Enright discuss the need for timely decision making by physicians in terms of whether a woman may lawfully obtain an abortion and consequences of delay in: Fiona de Londras and Mairéad Enright, *Repealing the 8th: Reforming Irish Abortion Law* (Policy Press, 2018) at 68.

<sup>98</sup> Elish O'Regan, "Irish women still travelling to Britain in droves for abortions" (*Irish Independent*, 4 April, 2019) available <https://www.independent.ie/irish-news/health/irish-women-still-travelling-to-britain-in-droves-for-abortions-37915827.html>

<sup>99</sup> Rachel Farrel, "HSE warns public against bogus 'MyOptions' website linking to anti-abortion material" (*Irish Independent*, 3 January 2019) available at <https://www.independent.ie/irish-news/health/hse-warns-public-against-bogus-myoptions-website-linking-to-antiabortion-material-37678581.html>

<sup>100</sup> Christina Finn, "HSE initiates legal proceedings over 'fake' MyOptions unplanned pregnancy website" (*The Journal*, 6<sup>th</sup> February 2019) <https://www.thejournal.ie/my-options-website-4479728-Feb2019/>

<sup>101</sup> Sean Murray, "Bogus abortion site still appearing on Google - but new law would enable takedown of 'harmful' content" (*The Journal*, 7<sup>th</sup> February 2019) <https://www.thejournal.ie/hse-my-options-4477409-Feb2019/>

<sup>102</sup> See discussion on need for such information in the abortion context in: Fiona de Londras and Mairéad Enright, *Repealing the 8th: Reforming Irish Abortion Law* (Policy Press, 2018), 68.

<sup>103</sup> Mairead Enright, Ruth Fletcher, Fiona de Londras, and Vicky Conway, "Position Paper on the Updated General Scheme of the Health (Regulation of Termination of Pregnancy) Bill 2018 (August 2018).

the HRTPA,<sup>104</sup> but it remains to be seen how it will operate in practice particularly if a considerable number of doctors raise conscientious objections. Prior to the introduction of the HRTPA, some argued that a conscientious objection should be extended to allow doctors to refuse to refer the patient to another doctor for access to abortion services which would have the potential to act as a barrier to accessing abortion.<sup>105</sup> This suggestion was rejected, but nonetheless, debates on the issue continue.<sup>106</sup>

Fourth, violations of international law may arise in terms of equality of access.<sup>107</sup> Although, the HRTPA provides that abortion services will be available without charge,<sup>108</sup> discrimination may still arise through indirect costs caused by the three day waiting period under the HRTPA.<sup>109</sup> According to the WHO, “mandatory waiting periods can have the effect of delaying care, which can jeopardise women’s ability to access safe, legal abortion services and demeans women as competent decision-makers.”<sup>110</sup> If women have to travel to a clinic twice over a three day period, this could pose similarly significant barriers to accessing abortion for those without financial means, or with caring/other responsibilities.<sup>111</sup> This in turn could constitute a violation of Art 26 ICCPR, and would also be contrary to the recommendations of CEDAW in this context, as set out in section D. If many doctors object to providing treatment, or some hospitals refuse to provide terminations in exceptional cases after 12 weeks, the indirect costs could be exacerbated as pregnant persons may have to travel long distances to find a health provider willing to perform a termination.

Fifth, although there is an obligation to decriminalise abortion in all circumstances, this is not fully achieved under the HRTPA. This criminal sanction only applies to third parties and does not apply to pregnant women who end their own pregnancy outside the grounds of the HRTPA (e.g. by procuring and taking abortion pills). Such women are decriminalised entirely under the HRTPA.<sup>112</sup> This is an important and welcome step forward. However, it will remain a criminal offence to intentionally end a foetal life outside the grounds provided for in the HRTPA, punishable by a fine or term of

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<sup>104</sup> It states that: “A person who has a conscientious objection referred to in subsection (1) shall, as soon as may be, make such arrangements for the transfer of care of the pregnant woman concerned as may be necessary to enable the woman to avail of the termination of pregnancy concerned. .”

<sup>105</sup> Cliona Murphy, “Repeal of the eighth amendment in Ireland Obstetrics and Gynaecology” (2018) 143 *Int J Gynecol Obstet* 129–136.

<sup>106</sup> Niamh Cahill, “More than 600 GPs lodge petition with ICGP for abortion EGM” (*The Medical Independent*, 13<sup>th</sup> March 2019) available at <https://www.medicalindependent.ie/more-than-600-gps-lodge-petition-with-icgp-for-abortion-egm/>

<sup>107</sup> Fiona de Londras and Mairéad Enright, *Repealing the 8<sup>th</sup>: Reforming Irish Abortion Law* (Policy Press, 2018), at pp. 81-86.

<sup>108</sup> Section 26 HRTPA which introduced an amendment to s. 62A of the Health Act 1970.

<sup>109</sup> There were attempts to remove this from legislative proposals, see: Sarah Bardon, “Abolish three-day waiting period for abortion, TD demands” (*Irish Times*, 22<sup>nd</sup> June 2018) available at <https://www.irishtimes.com/news/politics/abolish-three-day-waiting-period-for-abortion-td-demands-1.3540373>; See also recommendations in : Mairead Enright, Ruth Fletcher, Fiona de Londras, and Vicky Conway, “Position Paper on the Updated General Scheme of the Health (Regulation of Termination of Pregnancy) Bill 2018 (August 2018) at 8-9.

<sup>110</sup> See World Health Organisation, “Safe abortion: technical and policy guidance for health systems” (2<sup>nd</sup> Edition, 2012) at 96.

<sup>111</sup> For a discussion of the barriers waiting periods pose, see “Let’s Talk About: Mandatory Waiting Periods, Abortion Rights Campaign” (16<sup>th</sup> March, 2018) <https://www.abortionrightscampaign.ie/2018/03/16/lets-talk-about-mandatory-waiting-periods/>

<sup>112</sup> Section 23(3), HRTPA.

imprisonment up to 14 years, or both.<sup>113</sup> Therefore, doctors who provide abortions outside the grounds of the HRTPA will remain criminally liable and this could have a potential chilling effect on medical care or could encourage restrictive applications of the law; a point expanded upon in section F below. In making this argument, we accept that some deterrence mechanism may be needed to ensure terminations are carried out only within grounds agreed upon by law, however, the knock-on chilling effect which criminalising doctors could have in our view is not justifiable. Instead, we argue fines or other professional sanctions may be a more appropriate penalty.<sup>114</sup>

Sixth, there are likely to be issues with the practical implementation of the HRTPA, in light of the objections that Irish state-funded religious hospitals have to providing abortions. In July 2018, the Irish Catholic Bishops' Council produced guidelines seeking to stop abortions being performed in hospitals connected with the Catholic church.<sup>115</sup> In response, Minister for Health Simon Harris stated that all publicly-run hospitals have to provide access to abortion, and that conscientious objection applies to individuals but not to institutions.<sup>116</sup> It remains to be whether and to what extent this will be an issue as abortion services continue to be more widely rolled out in Ireland. As mentioned in section D, it has been recommended that religion should not be permitted to interfere with abortion access. Similarly, de Londras and Enright recommend that individual medical practitioners should be able to exercise an individual right of conscientious objection, but that an institution as an entity should not have such right.<sup>117</sup> Allowing religiously affiliated hospitals to refuse to provide abortion or limit their provision of such services would severely impact where abortions could be performed and pose a significant barrier to access for pregnant persons in seeking abortions.

Finally, it must be considered how such laws are being translated into medical practice. At a minimum, there must be active engagement with the medical profession to ensure that facilities are available and medical practitioners are appropriately trained to provide abortion services under the HRTPA. Training must be provided so that practitioners can provide safe abortions and aftercare, as well as accurate information about sexual health and reproduction, and impartial advice for individuals with crisis pregnancies. Furthermore, it is GPs who are providing abortion care for abortions under 12 weeks, however, GPs previously expressed concerns regarding their knowledge

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<sup>113</sup> Section 23, HRTPA.

<sup>114</sup> See also Mairead Enright, Ruth Fletcher, Fiona de Londras, and Vicky Conway, "Position Paper on the Updated General Scheme of the Health (Regulation of Termination of Pregnancy) Bill 2018 (August 2018).

<sup>115</sup> Séan Fahey, "Irish Bishops issue Catholic hospital guidelines that don't allow abortion" (25th July 2018) available at <https://www.buzz.ie/news/irish-bishops-catholic-hospital-abortion-293530>

<sup>116</sup> Evelyn Ring and Fiachra Ó Cionnaith, "Abortion debate: All publicly funded hospitals to provide legal health services, says Health Minister" (Irish Examiner, 26<sup>th</sup> July 2018) available at <https://www.irishtimes.com/ireland/all-publicly-funded-hospitals-to-provide-legal-health-services-says-health-minister-473045.html>

<sup>117</sup> As noted by de Londras and Enright as "a matter of international human rights law, institutions, unlike individuals, do not have consciences that can be protected by the individual right to freedom of conscience" in Fiona de Londras and Mairead Enright, *Repealing the 8th: Reforming Irish Abortion Law* (Policy Press, 2018) at 80, who cite the following sources: CEDAW, Concluding Observations: Hungary, (note 69) [31(d)] U.N. Doc. CEDAW/C/HUN/CO/7-8; see also the *Colombian Constitutional Court in Sentencia T-388/09*. Under ECHR law it is established that corporate persons do not enjoy individual rights such as freedom of conscience or freedom of expression; *Company X v Switzerland* (1979) 16 DR 85; *Verein Kontakt-Information-Therapie v Austria* (1988) 57 DR 81. Contrast *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al*. 573 US\_\_ (2014).

base and training on abortion services.<sup>118</sup> At the time of writing, there have been calls for an extraordinary general meeting (EGM) of the Irish College of General Practitioners to consider abortion services. One motion submitted under the EGM proposal is that routine general practice is not an appropriate setting for abortion provision, and that a clinical setting external to general practice would be more appropriate.<sup>119</sup> There is also limited existing institutional capacity for abortion provision. Only relatively small numbers of abortions were performed in Ireland under the limited exceptions provided for under the previous PLDPA,<sup>120</sup> thus, there is likely to be limited experienced practitioners in this area who will be able to act as mentors for junior colleagues. Additional professional training will therefore need to be provided to accommodate safe abortion access in Ireland under the grounds provided in HRTPA, and general practitioners have called for the provision of training courses and audits for medical practitioners providing abortion services.<sup>121</sup>

Indeed, prior to the adoption of the HRTPA, there was concern amongst medical practitioners that the lack of training would mean the health service may not be ready to provide access to abortion within the timeframe suggested by the government.<sup>122</sup> More specifically, representatives from the Medical Council, the Irish College of General Practitioners, and the Institute of Obstetricians and Gynaecologists who gave evidence to the Oireachtas Health Committee in discussing the proposed abortion framework highlighted several practical issues which made the delivery of abortion care in Ireland challenging and especially within the proposed timeline. Key issues included: the existing time and staffing constraints on GP care in Ireland which would be exacerbated by the addition of abortion services to their remit; the lack of training for GPs on abortion issues given the historic restrictions on abortion provision in Ireland; issues with infrastructure including the need for more ultrasound equipment to deliver abortion services;<sup>123</sup> concerns surrounding lack of specialist support in Ireland in this context; and a fear of litigation in this context.<sup>124</sup> Although abortion services have been available in Ireland since 1<sup>st</sup> January, it remains to be seen how such services are operating in practice, and to what extent these concerns, around medical training and capacity of GPs and

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<sup>118</sup> Cliona Murphy, “Repeal of the eighth amendment in Ireland Obstetrics and Gynaecology” (2018) 143 *Int J Gynecol Obstet* 129–136.

<sup>119</sup> Niamh Cahill, “More than 600 GPs lodge petition with ICGP for abortion EGM” (*The Medical Independent*, 13<sup>th</sup> March 2019) available at <https://www.medicalindependent.ie/more-than-600-gps-lodge-petition-with-icgp-for-abortion-egm/>

<sup>120</sup> 15 terminations were carried out under the Act in 2017, 25 were carried out in 2016, 26 in 2015, and 26 in 2014, see Department of Health, Notifications in Accordance with s. 26 of the Protection of Life During Pregnancy Act 2013, Reports of 2014, 2015, 2016 available at <https://health.gov.ie/blog/publications/notifications-in-accordance-with-section-20-of-the-protection-of-life-during-pregnancy-act-2013-annual-report-2016/>. The 2017 report is available at <https://health.gov.ie/wp-content/uploads/2018/06/PLDP-Annual-Report-2017.pdf>.

<sup>121</sup> Niamh Cahill, “More than 600 GPs lodge petition with ICGP for abortion EGM” (*The Medical Independent*, 13<sup>th</sup> March 2019).

<sup>122</sup> “Lack of training and equipment worries doctors ahead of abortion deadline” (*Irish Examiner*, 19<sup>th</sup> September, 2018) available at <https://www.irishexaminer.com/breakingnews/ireland/lack-of-training-and-equipment-worries-doctors-ahead-of-abortion-deadline-870111.html>

<sup>123</sup> Paul Cullen, “Abortion service to use private firms for ultrasound facilities” (*Irish Times*, 1<sup>st</sup> December 2018) available at <https://www.irishtimes.com/news/health/abortion-service-to-use-private-firms-for-ultrasound-facilities-1.3716344?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fhealth%2F-abortion-service-to-use-private-firms-for-ultrasound-facilities-1.3716344>

<sup>124</sup> “Lack of training and equipment worries doctors ahead of abortion deadline” (*Irish Examiner*, 19<sup>th</sup> September, 2018).

hospitals, have been or need to be addressed to provide meaningful access to safe abortion care as required under international law.

Nonetheless, given the long-established restrictive abortion framework in Ireland, satisfying Ireland's international obligations will not be met simply by introducing new laws and providing medical training. Rather, cultural and institutional barriers in the medical and legal context will likely need to be actively challenged, and in our view international law can also serve an important role in this context expanded upon in the sections which follow.

## **F. A Monitoring and Interpretative Role for International Law**

Aside from the role of international law in evaluating the provisions of the HRTPA on paper, we also argue that it could have an integral role to encourage the interpretation and implementation of the HRTPA in a meaningful and accessible manner.<sup>125</sup> In addition, international courts and TMBs can act as useful external systems to monitor Ireland's compliance with international law, and can provide avenues to petition for broader access to abortion should the laws on paper, or the interpretation of such laws in practice, be incompatible with international law. This section sets out why such role is likely to be important in the context of abortion, and section G then develops how international law can play this monitoring and interpretative role.

The monitoring and interpretative role of international law is particularly significant because Ireland has moved from a historically highly restrictive approach to abortion, as demonstrated in section B, to a much broader framework by the adoption of the HRTPA.<sup>126</sup> This will require a fundamental shift in the way decision-makers - such as hospitals and medical practitioners - provide abortion information and access to abortion on a day-to-day basis, and to how courts interpret the HRTPA should legal challenges arise. However, engrained 'thought-styles'<sup>127</sup> can develop within institutional contexts - in this context hospitals and GP practices in the day-to-day provision of abortion services, or courts in the context of legal challenges- over time which in turn can lead decision-makers, especially in cases of uncertainty, to revert towards traditional or restrictive patterns of decision-

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<sup>125</sup> On the importance of interpretation of abortion laws, see: Karen Trueman & Makgoale Magwentshu, "Abortion in a Progressive Legal Environment: The Need for Vigilance in Protecting and Promoting Access to Safe Abortion Services in South Africa" (2013) 103(3) *American Journal of Public Health* 397; Marge Berer, "Abortion Law and Policy Around the World: in Search of Decriminalization" (2017) 19(1) *Health and Human Rights* 13.

<sup>126</sup> In the words of Fiona de Londras and Enright, "Liberal abortion law on paper does not always translate into effective abortion access in practice, and human rights bodies are clear that once abortion is legalized it must be accessible without discrimination. If a new Irish abortion law repeats old mistakes around access, pregnant people will remain exposed to old human rights abuses." Fiona de Londras and Mairéad Enright, *Repealing the 8th: Reforming Irish Abortion Law* (Policy Press, 2018) at 64.

<sup>127</sup> See Mary Douglas, *How Institutions Think?* (Syracuse University Press, 1986)



making.<sup>128</sup> Decision-makers in such contexts are often slow to adapt to change.<sup>129</sup> This is likely compounded in the abortion context because as demonstrated in section E, a medical practitioner who is seen as performing an abortion outside of the parameters of the law will be guilty of a criminal offence punishable by a fine or imprisonment, or both.<sup>130</sup> However, there is no proposed penalty on hospitals or medical providers for not providing or hindering access to abortion. Thus, the way the law is framed, together with the cultural and institutional history of abortion in the Irish context, incentivises practitioners to interpret the law restrictively.<sup>131</sup>

Moreover, restrictive interpretations of the law are arguably particularly likely to occur where discretion is left to decision-makers. Discretion will be limited in the case of abortion access under s. 12 of the HRTPA in the context of early pregnancy because the ground is based on a time limit - either the time limit has not passed, and an abortion can be provided; or it has passed, and abortion cannot be provided. However, the provisions of the HRTPA providing for access to abortion in other circumstances such as in cases where there is a condition likely to lead to the death of the foetus or where there is a risk to the life or of serious harm to the health of the pregnant woman provide considerable discretion for doctors, hospitals and courts in their interpretation. For instance, s. 11 of the HRTPA provides for access to abortion in cases where there is a condition likely to lead to the death of the foetus either before, or within 28 days of birth. In applying this ground, doctors will have to decide what constitutes a condition likely to lead to the death of the foetus and the likelihood of this death occurring before the birth of the foetus, or within 28 days of birth. As noted above, there has already been some controversy in relation to how this provision is being interpreted. Importantly, we do not argue here that discretion should be stripped from the law. The law must have enough discretion or tolerance to allow it to adapt to medical developments,<sup>132</sup> such as where new conditions are identified as leading to fatal abnormalities. However, it is important to also be mindful that discretion makes laws susceptible to potential restrictive interpretations and if restrictive interpretations arise this could be in breach of Ireland's international law obligations to provide access to abortion in cases of fatal fetal abnormality.

This is not a hypothetical concern. There is evidence of abortion law being interpreted restrictively by Irish medical practitioners and courts under previous legal frameworks for abortion in Ireland, both (1) where there was scope for broader interpretations of the law to allow abortions; and (2)

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<sup>128</sup> On the development of thought styles within particular institutional contexts, see Mary Douglas, *How Institutions Think* (Syracuse University Press, Syracuse, 1986); On the subject of institutional change, see: Paul DiMaggio and Walter Powell, "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields" (1983) 48 *American Sociological Review* 147.

<sup>129</sup> On adaption to change and informal institutions see: Gretchen Helmke and Steven Levitsky, "Informal institutions and comparative politics: A research agenda" (2004) 2 *Perspectives on Politics* 735.

<sup>130</sup> Although it is conceded, that this will also depend on how the good faith requirement as specified in the grounds for termination under s. 9-12 of the HRTPA is interpreted.

<sup>131</sup> For further discussion of the significance of open-textured principles which provide discretion to decision-makers within an institutional context, see A McMahon, *The Morality Provisions in the European Patent System: An Institutional Examination* (PhD Thesis, University of Edinburgh 2016), chapter 2.

<sup>132</sup> See TT Arvind and Aisling McMahon, "Professional negligence and the quest for social responsiveness: Lessons from informed consent" (Working Paper).

where existing exceptions could have been applied to allow access to abortion but were not. In respect of example (1), we need only consider again the tragic case of Shelia Hodgers. She was denied an abortion despite her worsening health and severe pain, and this was before the 8<sup>th</sup> amendment and hence, occurred in the absence of any constitutional protection for the unborn. Access to early inducement of pregnancy or an abortion in her case was denied based on the statutory protection for the foetus under s. 58 and 59 of the OAPA 1861. However, the same Act was also applicable in the England, Wales and Northern Ireland, and courts in Northern Ireland had carved out an exception to the prohibition of abortion where the life of the pregnant woman was in danger. In *R v Bourne*,<sup>133</sup> MacNaughten J held that:

“If the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are entitled to take the view that the doctor is operating for the purpose of preserving the life of the mother.”

This exception to the OAPA was subsequently applied in other States where the OAPA was applicable,<sup>134</sup> but was not invoked in the Irish context in Shelia Hodgers’ case. Thus, despite the severity of her illness - which meant she would have arguably met the criteria of a *Bourne* type exception – the law was not interpreted by her doctors in a way to allow her to have a termination, nor did the medical team raise this as a point of uncertainty which needed interpretation by the courts. In fact, not only did her medical team not seek to apply such an exception, they acted in a highly restrictive manner by also refusing any pain relief in earlier stages of pregnancy in case it would harm the foetus.

Abortion was denied in the circumstances set out in (2) in Savita Halappanavar’s case. Ms Halappanavar arguably should have qualified for a termination under the existing exception to the 8<sup>th</sup> amendment where abortions were allowed where there is a serious and substantial risk to the pregnant woman’s life. Moreover, even if this risk was not identified when she initially presented, it could have been identified in the course of her treatment in hospital. Further weight could also have been given to the fact that there was no prospect for the foetus to survive given the early stage of pregnancy. Thus, denial of abortion for the ostensible purposes of protecting the life of the foetus was entirely medically futile.<sup>135</sup> We argue elsewhere that abortions in circumstances of fatal foetal

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<sup>133</sup> *R v Bourne* [1938] 3 All ER 615.

<sup>134</sup> See discussion in <https://www.womenslinkworldwide.org/en/gender-justice-observatory/court-rulings-database/r-v-bourne> which highlights that it was affirmed in other former British colonies and Commonwealth countries including: Zambia (HP.11/1971), Canada (*R. v. Morgentaler*), New Zealand (*R. v. Anderson*), Australia (*R. v. Davidson*) and in Nigeria under the jurisdiction of the West African Court of Appeal (*R. v. Edgal*). Additionally, the East African Court of Appeal (EACA) affirmed the decision made by the Kenyan Supreme Court in *Mehar Sing Bansel v. R* (1959), where *R. v. Bourne* was crucial.

<sup>135</sup> The independent report into her death noted that: “There are no accepted clear local, national or international guidelines on the management of inevitable early second trimester miscarriage (i.e. less than 24 weeks) including the management of miscarriage where there is prolonged rupture of the membranes. The reason for the absence of such guidelines may be that clinical practice in other jurisdictions would have led to an early termination of pregnancy in equivalent clinical circumstances. It is recommended that such guidelines be developed for such patients as a matter of urgency and they should be explicit in the guidance given as to when one should offer termination based on symptoms and signs of infection

abnormalities were not necessarily contrary to the 8<sup>th</sup> amendment given that the foetus's right to life cannot be vindicated which makes attempts to protect foetal 'life' futile in such circumstances.<sup>136</sup> A similar argument could be made in the context of Ms Halappanavar's case and thus the 8<sup>th</sup> amendment could have been interpreted as providing a lawful abortion in her case both in respect to (i) the X exception of risk to life; and (ii) the fact that abortions in cases of where the foetus will not survive were not necessarily contrary to the 8<sup>th</sup> amendment. Thus, we argue that Ms Halappanavar could have had an abortion within the legal framework that existed at the time.

These cases serve as two stark examples of how restrictive applications of law have occurred previously within the Irish context despite there being avenues for interpreting the law more broadly and/or applicable exceptions under the law. CEDAW has also previously noted that Irish law on abortion has been interpreted in a 'very restrictive manner'.<sup>137</sup> We therefore argue that there is evidence of an engrained tendency towards restrictive applications of the law in both courts and in medical practice which will likely take considerable time to change. It may therefore be difficult to obtain meaningful access to abortion in Ireland under the recently introduced HRTPA, and only time will tell whether this framework is delivering such access.

### **G. Challenging Restrictive Interpretations: The Interpretative and Monitoring Role of International Law**

Based on the foregoing, this section illustrates how (i) domestic courts can and should use international law as an interpretative tool to counter restrictive interpretations of the HRTPA should they arise, and/or to allow for abortion access in cases where the law is uncertain; and how (ii) international courts and TMBs offer valuable mechanisms to hold Ireland to account should its domestic law be found to violate international standards.

#### *1. Invoking international law in Irish domestic courts*

This section illustrates that an international treaty can be invoked in an Irish domestic court in two ways. First, treaties which have been incorporated into domestic law can be invoked by citing the relevant implementing act. Second, for a treaty to which Ireland is a party but which has not yet been incorporated into domestic law, the treaty can nonetheless be applied where the domestic law is uncertain on the basis of Fennelly J's dicta in *Kavanagh v Governor of Mountjoy Prison*.<sup>138</sup> An

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implying increasing health risk to the mother which may even threaten her life." HSE, Investigation of Incident 50278 from time of patient's self referral to hospital on the 21st of October 2012 to the patient's death on the 28th of October, 2012. (Final Report, June 2013) at 59.

<sup>136</sup> McMahon and Ní Ghráinne, 'Reconsidering the Irish Constitution and International Law: Abortion and Fatal Fetal Abnormality' (Working Paper, March 2018) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3134542](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3134542).

<sup>137</sup> CEDAW, Concluding observations on the combined sixth and seventh periodic reports of Ireland, 9 March 2017, CEDAW/C/IRL/CO/6-7.

<sup>138</sup> *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 IR 97

analysis of the Irish Constitution and its relationship with international law, together with the relevant jurisprudence, is therefore warranted.<sup>139</sup>

II. *Invocation of treaties to which Ireland is a party, and have been incorporated into domestic law*

Article 29.6 of the Constitution states that:

“No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.”

Thus, for a treaty to be binding domestically, signature must be followed by a legislative act implementing the treaty into domestic law.<sup>140</sup>

An example of such an implementing act is the European Convention on Human Rights Act 2003, which gives effect to the ECHR.<sup>141</sup> Section 2 of that Act requires that, subject to the existing rules of statutory interpretation, the Courts should apply both common law rules and statutory provisions so that they are compatible with the Convention. Section 3 requires that, subject to any other provisions of domestic law, 'organs of state' must perform their duties in a manner compatible with the Convention. Anyone who suffers injury, loss or damage as a result of such a body's failure to do this is entitled to damages. Moreover, s. 5 of the Act grants to the courts the power to make a declaration that a statutory provision or common law rule is incompatible with the Convention. Such a declaration does not render the law in question invalid, but the Taoiseach is obliged to bring any such declaration to the attention of both Dáil and Seanad Éireann (the Irish Houses of Parliament). A litigant who has been granted a declaration of incompatibility may receive monetary compensation in accordance with the principles of just satisfaction under Article 41 of the Convention, but the award of such compensation is entirely within the discretion of the government.

Thus, an individual may invoke the relevant provisions of the ECHR as set out above in challenging Irish abortion legislation in an Irish court. Moreover, they can also invoke the ECtHR jurisprudence as authoritative and binding determinations of the meaning of obligations flowing from the ECHR.

III. *Invocation of treaties to which Ireland is a party, but have not yet been incorporated into domestic law*

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<sup>139</sup> See generally, GW Hogan and GF Whyte, *JM Kelly: The Irish Constitution* (LexisNexis Butterworths, 2003) at 5.3.

<sup>140</sup> CR Symmons, “International treaty obligations and the Irish constitution: The McGimpsey case” (1992) 41(2) *International and Comparative Law Quarterly* 313, 318. This was confirmed in *Re Laighleis* [1960] I.R. 93 and *Norris v Attorney General* [1984]. I.R. 36, at para 156. See generally, CR Symmons, “The Law Enforcement Report and Article 29 of the Irish Constitution” (1973) 8(1) *Irish Jurist* 33, 39. An exception to this is European Union law where the principles of direct effect apply depending on the legal instrument in question.

<sup>141</sup> On the status of ECHR in Irish law see *McD v L* [2010] IR 199.

The other treaties referred to in section D above have not been followed by a subsequent Irish domestic implementing act. Thus, these treaties are not directly binding in Irish courts and cannot necessarily be used to challenge the HRTPA.

However, we argue that in some circumstances, domestic law can be read in a way which aligns with Ireland's international law obligations, even if these treaties are not yet binding at a domestic level. In this way, international law can be used as a persuasive source to interpret Irish law.

In *Kavanagh v Governor of Mountjoy prison*, the Supreme Court held that the views of the HRC would not prevail over Acts of the Oireachtas, the Constitution or decisions of the Irish courts.<sup>142</sup> However, Fennelly J stated that there remains an expectation that states will generally abide by treaties to which they are party:

“I am prepared to assume that the State may, by entering into an international agreement, create a legitimate expectation that its agencies will respect its terms. However, it [the State] could not accept such an obligation so as to affect either the provisions of a statute or the judgment of a court without coming into conflict with the Constitution.”<sup>143</sup>

Accordingly, we argue that where a provision of Irish law is unclear, with two possible interpretations – one which conflicts with international law and one which is in accordance with international law – the latter interpretation should be adopted. This stems from the fact that there is a presumption that Ireland will comply with its obligations under international law, unless there is a conflict between Irish law and international law.<sup>144</sup>

Following such an approach would help Ireland to move away from restrictive approaches to abortion law, would help it comply with its international law obligations, maintain its reputation as high compliance state, and reduce the likelihood of claims being brought to TMBs and international courts.

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<sup>142</sup> *Kavanagh v. Governor of Mountjoy Prison* [2002] IESC 13, para 36.

<sup>143</sup> *Ibid*, para 43. This is also discussed in Siobhán Mullally, “Mellet v Ireland: Legal Status of the UN Human Rights Committee’s ‘Views’” *Centre for Criminal Justice and Human Rights Blog* (16 June 2016) available at (<http://blogs.ucc.ie/wordpress/ccjhr/2016/06/16/mellet-v-ireland-legal-status-un-human-rights-committees-views-2/>) which provides an interesting discussion of *Fakih & Ors v. Minister for Justice* [1993] ILRM 274 and *Gutrani v. Minister for Justice* [1993] 2 IR 427 where Mullally highlights that the 1951 Convention relating to the Status of Refugees “not yet incorporated into domestic law, was given indirect effect, circumventing the strict requirements of Article 29.6 of the Constitution”.

<sup>144</sup> Although not relevant to the argument in this article, for the sake of completeness we should mention the relevance of customary international law (CIL). Article 38(1)(a) of the Statute of the International Court of Justice describes CIL as “evidence of a general practice accepted as law.” In *Nicaragua v USA* [1986] ICJ Rep 14 at para 207, the ICJ stated that not only must the acts concerned “amount to a settled practice” but they must be accompanied by the *opinio juris sive necessitates*. In terms of the influence of CIL on Irish law, in *ACT Shipping (PTE) Ltd v Minister for the Marine* [1995] 3 I.R. 406 Barr J stated that “In my opinion Article 15.2 [which provides that the Oireachtas has sole power to make laws for the State] does not inhibit the evolution of international customary law into Irish domestic law.” However, in *Shipping (PTE) Ltd v Minister for the Marine* [1960] IR 93, Barr J stated that principles of CIL can only be part of domestic law provided they are not contrary to domestic law in the form of provisions of Constitution, statute or common law. For a discussion, see: GW Hogan and GF Whyte, *JM Kelly: The Irish Constitution* (Bloomsbury, 2003), at 492.

#### IV. Recourse to the international stage

International institutions can also have a monitoring role and can be used to seek declarations of violations of international law. Ireland has granted jurisdiction to many international fora to receive complaints, including the ECtHR and to TMBs such as the HRC, the CRC, the Committee Against Torture (CAT), and CEDAW. An individual who has exhausted domestic remedies could bring a challenge to any one of those bodies and if found in violation of its obligations, Ireland would be under pressure to provide a remedy or change the law, for example, by way of providing compensation as happened following the HRC's views in *Mellet* and *Whelan*.<sup>145</sup> As noted, if the state fails to address the views of international monitoring bodies, further complaints can be brought. The more violations that are found by international institutions, the more a consensus develops about the scope of international abortion rights, and the more pressure that can be placed upon states to change their laws. Furthermore, decisions from international institutions can provide fodder to domestic groups to lobby for change, particularly as the HRC, CEDAW and other TMBs tend to be more liberal in their jurisprudence than the ECtHR. Moreover, TMBs have an additional external monitoring role as the periodic reports of TMBs can be used to examine and highlight issues concerning access to abortion or how the framework under the HRTPA is operating. The UN's Human Rights Council has a similar monitoring role.<sup>146</sup> This can in turn have reputationally damaging consequences if States fail to act to address issues found.

#### H. Conclusion

Although international law did not play a significant role in the lead up to the referendum on the 8<sup>th</sup> amendment, this article argues that it has a vital role to play in the interpretation of the HRTPA and the monitoring of the reformed framework for abortion access in Ireland. This is because Ireland is a party to several treaties which lay out obligations concerning abortion access, and Ireland is legally obliged to adhere to these commitments. In particular, Ireland should ensure that the operation of the new legal framework, at a minimum: (i) decriminalizes abortion in all circumstances; (ii) provides safe and effective access to abortion where pregnancy was a result of rape or incest; in cases of fatal foetal abnormality; and where the women's health or life is at risk; (iii) ensures that the grounds upon which abortion is legally available are clear; (iv) ensures that abortion is accessible in a timely manner; (v) makes information on crisis pregnancy options available through a variety of channels,

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<sup>145</sup> Both Síobhán Whelan and Amanda Mellett were paid 30,000 in compensation by the State, see Paul Hosford, "State pays €30,000 to woman denied abortion in Ireland" (The Journal, 7<sup>th</sup> November, 2017) available at <http://www.thejournal.ie/siobhan-whelan-compensation-payout-3685092-Nov2017/>

<sup>146</sup> The Human Rights Council is an inter-governmental body within the United Nations system made up of 47 States responsible for the promotion and protection of all human rights around the globe. The Human Rights Council has various means by which the monitor the implementation of human rights, including the Universal Periodic Review (UPR). This process involves a review the state's adherence to (a) the UN Charter (b) the Universal Declaration of Human Rights (c) human rights treaties to which the State is party; and (d) voluntary pledges and commitments made by the State. See <https://www.ohchr.org/en/hrbodies/hrc/pages/home.aspx>

and introduces measures to address bogus providers of abortion information; (vi) provides quality abortion care under the HRTPA; (vii) strengthens services for the prevention of pregnancy through family planning; (viii) ensures non-discrimination between pregnant persons by ensuring equality of access concerning family planning and abortion, regardless of individual's socio-economic or other backgrounds; and (ix) ensures that religious practices do not interfere with the provision of abortion access.

This article makes concrete suggestions as to how Ireland can fulfil these obligations, such as by decriminalising abortion fully; reconsidering the 3-day waiting period for abortions; ensuring the provision of non-judgmental abortion counselling and information services; and by addressing practical issues such as providing ongoing training for medical doctors to provide safe abortion care under the HRTPA.

This article has also illustrated that the HRTPA is likely to be susceptible to restrictive interpretation and application by medical practitioners and courts given the institutional and historical context of abortion in Ireland. The law's interpretation and application should therefore be carefully monitored to ensure meaningful and accessible abortion access. We argue that international law could play an important role in such contexts. Where such practices conflict with international law obligations, international law can be relied upon directly in a domestic court by either (i) relying on the relevant treaty's implementing legislation; or (ii) invoking international law as a persuasive source, which can be used to interpret domestic law in cases of uncertainty where there is no direct conflict between the respective international law obligations and domestic laws (such as the Constitution or statutory provisions). Individuals can also petition international bodies such as the HRC, CEDAW, CRC, UNCAT or ECtHR when they believe that their human rights have been violated. Successful complaints have been brought against Ireland in the past and are likely to continue to be brought should Ireland's new framework fall short of its international obligations.

By repealing the 8<sup>th</sup> amendment, the Irish people gave the government a mandate to liberalise its restrictive abortion laws. The repeal vote provided the government with a golden opportunity to finally align its framework with international law. Although many minimum obligations under international law have been achieved on paper by the adoption of the HRTPA, shortfalls remain. Moreover, it remains to be seen whether the interpretation and practical implementation of the HRTPA will provide meaningful and safe abortion access or if restrictive interpretations of the law and backsliding will occur. International law can provide a valuable yardstick by which to assess whether Ireland has made valuable use of this once in a generation opportunity.